Supreme Court U.S.
FILED
APR 3 1902
JAMES H. McKENNEY,
Clerk.

No. 234.

Brief of Emery for P. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 234.

Filed April 3, 1902.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY AND THE NEW YORK AND HARLEM RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

THOMAS EMERY,
of Counsel.

INDEX.

	PAGE
Statement of Facts	1
FIRST POINT.—Right of disposal of property is itself property within the meaning of the constitution	9
SECOND POINT.—Equitable remedy to remove cloud on title ante-dated and is continued by state constitution	15
THIRD POINT.—Remedy against assessments impeachable only by evidence *aliunde* is within the above rule	24
FOURTH POINT.—Remedy is inadequate if deferrable by adversary until evidence is outlived	28
FIFTH POINT.—Remedy such as here invoked is not denied by previous judgments of the State Courts	31
SIXTH POINT.—Special benefit is jurisdictional prerequisite to valid local assessment	52
SEVENTH POINT.—Question of benefit is one upon which aggrieved party is entitled to judgment of the Courts	58
EIGHTH POINT.—Not necessary to jurisdiction herein that violation of constitutional right be specifically set up	61
NINTH POINT (Summary).—Plaintiff's rights guaranteed by the Federal Constitution are violated by the proceedings and judgment here presented for review	64
CASES RELIED UPON BY CITY IN STATE COURTS, REFERRED TO AND COMMENTED UPON HEREIN:	
Lennon *vs.* Mayor, 55 N. Y., 361	44
Matter of Brainerd, 51 Hun, 380	43
Matter of Chesbrough, 44 N. Y. St. Rep., 586	43
Matter of Cullen, 53 Hun, 534	44
Matter of Feust, 121 N. Y., 299	44
Matter of Mead, 74 N. Y., 216	42
Matter of Smith, 67 How. Pr., 501	39
Same, 99 N. Y., 424	39
Matter of West, 20 N. Y. L. Jour., 558	44
Tripler *vs.* Mayor, 125 N. Y., 617	45
Same, 139 N. Y., 1	47
These cases, and issues therein, summarized.	
N. Y. STATUTES REFERRED TO HEREIN:	
Chap. 338, Laws 1858, Secs. 1, 2, 3. Remedy	33
Chap. 312, Laws 1874, Sec. 1, 2. Remedy	34
Chap. 550, Laws 1880, Sec. 12. Remedy	34
Chap. 410, Laws 1882 (Consolidation Act):	
Sec. 868. Assessment, how and by whom to be levied	5
" 878. Assessment, just and equitable among houses and lots benefited, in proportion to benefit	5
" 897. Remedy, bill in equity denied	35
" 898. Remedy, assessment, vacated for fraud or substantial error; reduced in proportion to cost added by irregularity	35
" 900. Remedy, order vacating assessment to be certified to proper officers	36
" 903. Remedy, forbids vacation of assessments; allows reduction in proportion to excessive cost of work	36

PAGE

Chap. 378, Laws 1897 (Greater New York Charter):
Sec. 402. Assessment, on property benefited, in proportion to benefits 5
" 946. Assessment, on property benefited 5
" 958. Remedy, forbids bill in equity or otherwise to vacate assessment or remove cloud on title 37
" 959. Remedy, assessment, vacated or modified for fraud or substantial error; reduced in proportion to excessive cost of work 38
" 962. Remedy, forbids vacation of assessment; allows reduction in proportion to excessive cost of work 38
" 1017. Assessment, lien shall continue until paid 6
" 1027. Sale authorized to satisfy lien 5
" 1041. Lease, presumptive evidence of regularity of assessment 5
" 1614. Remedy, preserved as to proceedings under Consolidation Act 39

PLAINTIFF'S CITATIONS HEREIN:

Alexander *vs.* Bennett, 60 N. Y., 204 21
Allegheny City *vs.* R.R. Co., 138 Pa., 382 54
Allen *vs.* City of Buffalo, 39 N. Y., 390 25
Am. & Eng. Encyc. of Law, Sec. 1048, 1049 21
Apthorpe *vs.* Comstock, 1 Hopk. Ch., 143 17
Same, 2 Paige Ch., 482 17
Armstrong *vs.* Treas. Athens County, 16 Pet., 281 62
Beach, Modern Equity, Vol. 2, Sec. 268 14
Bridge Proprietors *vs.* Hoboken, 1 Wall, 116 ..... 16, 62
Brown *vs.* Buck, 75 Mich., 274 22
Bushnell *vs.* Harford, 4 Johns. Ch., 301 17
Campbell *vs.* Holt, 115 U. S., 630 11
Chase *vs.* Chase, 95 N. Y., 373 14
Chi., Ill., & St. P. R.R. Co. *vs.* Milwaukee, 89 Wis., 506 55
Cohens *vs.* Virginia, 6 Wheat., 264 ..... 18, 31
Colon *vs.* Lisk, 153 N. Y., 188 21
Colonial, &c., Co. *vs.* Kingston R R. Co., 154 N. Y., 495 31
Commonwealth *vs.* Commrs., 37 Pa. St., 237 22
Cowles *vs.* Mercer, 7 Wall., 118 27
Daly *vs.* Sanders, 9 N. Y. St. Rep., 794 6
Davidson *vs.* New Orleans, 96 U. S., 97 16
De Hart *vs.* Hatch, 3 Hun, 375 19
Dewey *vs.* Des Moines, 173 U. S., 193 59
French *vs.* Barber Asphalt Co., 181 N. Y., 324 57
Fisk *vs.* Jefferson Police Jury, 116 U. S., 131 ..... 16, 62
Garnett *vs.* Macon, 6 Call. (Va.), 308 15
Gilman *vs.* Tucker, 128 N. Y., 190 11
Gross *vs.* Mortgage Co., 108 U. S., 477 63
Guy *vs.* Hermance, 5 Cal., 73 23
Haywood *vs.* City of Buffalo, 14 N. Y., 534 25
High on Injunctions, Secs. 524, 525, 526 24
Irving *vs.* Campbell, 121 N. Y., 353 14
Janesville *vs.* Carpenter, 77 Wis., 288 11
Jefferson Bank *vs.* Skelly, 1 Black, 436 62
Junction R. Co. *vs.* Philadelphia, 88 Pa., 424 55

	PAGE
Lewis *vs.* City of Buffalo, 29 How. Pr., 338	24
McManus *vs.* O'Sullivan, 91 U. S., 578	68
Marbury *vs.* Madison, 1 Cranch, 137	12
Matter of Commrs. Pub. Parks, 47 Hun, 302	54
Matter of Jacobs, 98 N. Y., 98	11
Matter of Moore, 108 N. Y., 280	63
Matter of Munn, 165 N. Y., 149	49
Maupin on Marketable Titles, Secs. 283, 289, 306	14
Monroe County *vs.* City of Rochester, 154 N. Y., 570	25
Moore *vs.* Williams, 115 N. Y., 586	14
Morris & Essex R.R. Co. *vs.* Jersey City, 64 N. J. Law, 148	55
Murdock *vs.* City of Memphis, 20 Wall, 590	63
Murray *vs.* Harway, 56 N. Y., 337	14
N. Y. C. & H. R. R.R. Co. *vs.* Aldridge, 135 N. Y., 83	53
N. Y. Constitutions, Supreme Court jurisdiction	18
N. Y. Court Rules, 1900, page 9	63
N. Y. Court Rule No. 41	63
N. Y. & Harlem R.R. Co. *vs.* Board, etc., Morrisania, 7 Hun, 652	54
N. Y. Laws, 1813, page 494, note	18
Norwood *vs.* Baker, 172 U.S., 269	47, 55, 58
Philadelphia *vs.* RR. Co., 33 Pa., 41	55
Philadelphia Fire Ass'n *vs.* New York, 119 U. S., 110	63
People *ex rel. vs.* Nichols, 18 Hun, 535	63
Pumpelly *vs.* Green Bay Co., 13 Wall., 166	12
Re Morgan, 26 Colo., 415	13
Rose *vs.* Calland, 6 Ves., 189	15
Scott *vs.* Onderdonk, 14 N. Y., 9	25
Seamon *vs.* Delancey, 1 Hopk. Ch., 436	14
Sheldon *vs.* Newton, 3 Ohio St., 494	27
Sherman *vs.* Felt, 2 N. Y., 186	18
Spencer *vs.* Merchant, 100 N. Y., 585	47
Same, 125 U. S., 345	61
State *vs.* Bank of Tenn., 5 Sneed, 573	22
State (Morris & E. R.R. Co.) *vs.* Jersey City, 36 N. J. Law, 56	55
Same *vs.* Elizabeth City, 37 N. J. Law, 330	55
Tonawanda *vs.* Lyon, 181 U. S., 389	47, 56
University *vs.* People, 99 U. S., 309	62
Walkill Valley R.R. Co. *vs.* Keator, 101 N. Y., 610	63
Water Power Co. *vs.* Street Ry. Co., 172 U. S., 475	62
Webster *vs.* Trust Co., 145 N. Y., 275	14
Wynehamer *vs.* People, 13 N. Y., 378	9

SUPREME COURT OF THE UNITED STATES.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and THE NEW YORK AND HARLEM RAILROAD COMPANY, Plaintiffs in Error, *vs.* THE CITY OF NEW YORK.	October Term, 1901. No. 234.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of Facts.

This is a proceeding by writ of error to the Supreme Court of the State of New York (p. 58), allowed by his Honor Justice Brown (p. 59), to review a final judgment of and rendered and entered by said Supreme Court of said State at Special Term, of date July 21, 1899, denying upon the merits the prayer of plaintiffs' petition (p. 10); which said judgment was upon appeal thereto affirmed by the judgment of the Appellate Division, First Department, of said Supreme Court, rendered and entered of date March 9, 1900 (p. 39); and the said judgment of the Supreme Court, Special Term, and Supreme Court, Appellate Division, First Department, respectively, were, upon appeal thereto, affirmed by the judgment of the Court of Appeals of the said State, rendered and entered of date June 22, 1900; and, by remittitur of that date the said Court of Appeals remitted the said notice of appeal, return and record to the said Supreme Court before the Justices thereof to there remain and be enforced according to law (p. 1); whereupon by order of the said Supreme Court of date June 29, 1900, the said orders and judgments of the said Appellate Division, First Department, and of the said Court of Appeals, respectively, were made the order and judgment of the said Supreme Court (pp. 44, 45); and final judgment rendered and entered according thereto in and by said Supreme Court of date October, 18, 1900 (pp. 45–47).

In and by their objections to the certain assessments in question herein, presented before the board of assessors (pp. 35, 36), as also in and by their said petition filed in and presented to and before the said Supreme Court of the State of New York (pp. 4–8), the said plaintiffs alleged ownership

in fee by plaintiff The New York and Harlem Railroad Company, lease by it to plaintiff The New York Central and Hudson River Railroad Company, and possession by the latter, as such lessee, of the certain therein described railroad right of way grounds of the width of 66 feet, with the four-track railroad thereon, paralleling and extending upon and along and bounded easterly by the westerly line or side of the public highway known as Park Avenue, otherwise known as Vanderbilt Avenue East, from the line between the 23d and 24th Wards to 177th Street, and of other lands adjoining and situate westerly of said railroad right of way grounds, all situate in the Borough of the Bronx in the City of New York, and all held, owned, used and occupied in no other wise than exclusively for railroad purposes; and that under and by the terms of the said lease the said lessee therein covenants and agrees to pay all taxes, charges and assessments, ordinary and extraordinary, that may be imposed or assessed in any way thereon (pp. 4, 7).

Plaintiffs in and by their said petition further alleged, and and prayed judgment and decree thereon, as follows, to wit:

"That the grade of the said Park Avenue, or Vanderbilt avenue east, is from 10′ 5″ to 18′ 3″ above the level of the grade of the roadway and tracks of your petitioners, as shown upon the cross-sections thereof which are hereto annexed and marked 'Exhibit D,' which is hereby made a part of this petition, and that there is no access possible from the said lands of your petitioners to the said Vanderbilt avenue east, but, upon the contrary, that the said lands and roadway of your petitioners were heretofore under a contract made by and between the department of public parks in the city of New York, and your petitioners, The New York and Harlem Railroad Company, dated January 11, 1888, which said contract was made, entered into, executed and carried out under the provisions of chapter 721 of the Laws of 1887, depressed to their present grade and solid stone retaining walls built upon and along the easterly and westerly sides of the said lands in order that access to and from public streets and avenues, including that part of Park avenue, or Vanderbilt avenue east, between said ward line and 177th street, should be cut off and rendered impossible.

That the total amount of the said assessment first above mentioned for regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from ward line to 177th street, is $10,994.41, of which the said sum of $4,687.82 was made, laid or imposed upon the land of your petitioners as aforesaid; that the total amount of the said assessment secondly above mentioned for pav-

ing Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, is $26,167.14, of which the said sum of $12,626.72 was made, laid or imposed upon the land of your petitioners as aforesaid.

And your petitioners further show that the improvements for which the said assessments have been made, laid or imposed are local improvements, and that in the said proceedings under which the said assessments have been made, laid or imposed substantial errors have been committed, among which are the following:

FIRST.—That the said lands owned, occupied and used by your petitioners as aforesaid and upon which said assessments have been made, laid or imposed are not houses and lots within the meaning of the said ordinances and statutes, and that the said lands owned, occupied and used by your petitioners, as aforesaid, have not been, will not be, and cannot be, benefited in any manner by the said improvements.

SECOND.—That there was and is no authority of law for the assessment upon the said lands owned, occupied and used by your petitioners as aforesaid, and upon which said assessments have been made, laid or imposed for the total cost or any part of the cost of the said improvements.

THIRD.—That the cost and expense of the said work in making said improvements have not been distributed equally or in proportion to the benefit upon the houses and lots fronting upon said Vanderbilt avenue east, and upon all the houses and lots benefited thereby and assessable therefor.

Wherefore, your petitioners pray that the said assessments be vacated and that the lien or liens created thereby, or by any subsequent proceedings, cease, so far as the said assessments affect the said lands owned, occupied and used by your petitioners as aforesaid, and that the collector of assessments and arrears, the clerk of arrears, the comptroller, and the deputy comptroller of the city of New York, be each directed to cancel and discharge said assessments and liens, or apparent liens, upon the records in their respective offices, so far as the same affect the said lands of your petitioners" (pp. 7, 8, 9).

The evidence adduced at the hearing upon said petition established the following facts:

Vanderbilt Avenue East runs northerly and southerly, and its westerly line is the easterly line of the roadway owned by the petitioner The New York and Harlem Railroad Company,

and leased to the petitioner The New York Central and Hudson River Railroad Company. This roadway is a strip of land 66 feet in width, acquired by The New York and Harlem Railroad Company by purchase in 1842 (pp. 12 and 24), for the purposes of its railroad. The statutory provision in regard to the acquisition of this strip of land is contained in the charter of The New York and Harlem Railroad Company, Section 8, Chapter 263 of the Laws of 1831, and is as follows:

> "It shall be lawful for the said corporation to enter upon and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double rail-road or ways, and may also receive, hold and take all such voluntary grants and donations of land and real estate as shall be made to the said corporation, to aid in the construction, maintenance and accommodation of the said single or double rail road, or ways."

At the time when such strip of land was acquired Vanderbilt Avenue East had not been laid out or opened, or even indicated or shown on any filed map (p. 14). Adjoining this strip, used for right of way, on the west, another parcel has been acquired by The New York and Harlem Railroad Company by various deeds (pp. 12, 13); and as to this parcel, in addition to the provisions of the charter, the deed conveying the principal part thereof (p. 12), provides that it "shall be used solely and only for the purposes of a railroad and station house to be thereon erected."

Upon the 66-foot strip four tracks have been constructed in a depressed cut. The grade of these tracks is from 11 feet 1 inch to 18 feet 8 inches below the grade of Vanderbilt Avenue East (p. 38, Petitioners' Ex. 19). Prior to January 11, 1888, the railroad was a two-track railroad at grade. It was depressed at large expense, borne wholly by the railroad company, under a contract bearing that date, made between the railroad company and the Department of Public Parks (then having jurisdiction over streets and avenues in the 23d and 24th Wards), pursuant to the provisions of Chapter 721 of the Laws of 1887. The purpose of the depression was to free the railroad company, the city and the public from the burden of grade crossings, and to prevent absolutely all access from public streets or avenues to the railroad tracks (p. 15). That purpose was accomplished, and as a matter of fact there is now no access from Vanderbilt Avenue East to any of the lands of the petitioners upon which the assessments complained of were levied. The form of construction of the depressed railroad is shown on the cross-section, Exhibit D, annexed to the petition, from which it will be seen that Vanderbilt Avenue East is abso-

lutely separated from the railroad lands by a permanent stone retaining wall, and also by a picket fence erected upon the division line between the railroad lands and the avenue (Ex. 13 g, opp. p. 11).

The inception of Vanderbilt Avenue East was its appearance on certain maps, two dated in 1848, and one in 1851 (pp. 13, 14). The avenue, or parts of it, appear upon these maps as Railroad Avenue. Later, and at the time proceedings were instituted by the City to open it, it was known as Vanderbilt Avenue East, and is now known as Park Avenue East.

Except for this indication on these maps, it does not appear that any steps were taken to make it a public street or avenue until the proceedings instituted by the Commissioners of the Department of Public Parks, which resulted in the acquisition of title to the land of this avenue, the report of the Commissioners of Estimate and Assessment being confirmed August 11, 1887 (pp. 18, 26). It will be observed that this was prior to the depression of the tracks under the contract of January 11, 1888, that is, while the railroad was at grade. It appears from these proceedings and from the proceedings on the appeal taken from the order confirming the report of Commissioners (see 47 Hun, 302), that the Commissioners of Estimate and Assessment did not regard the avenue as of any benefit to the railroad company, and their judgment was approved by the Court, both at Special and General Terms.

Under the resolutions of the Common Council authorizing the improvements to defray the cost of which the assessments complained of were made, no part of the cost of the improvements was to be borne by the City at large, but the entire cost was to be assessed

> "*among the owners and occupants of all the houses and lots intended to be benefited thereby, in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire.*" (Sec. 878, Consolidation Act; Exhibits A and B, attached to Petition, Sec. 402, Charter.)

The direction of the Statute to the Board of Assessors is: "*the Board of Assessors shall assess upon the property benefited.*" (Consolidation Act, § 868; Charter, § 946.)

The charter provision in reference to sale of property for non-payment of taxes or assessments (Sec. 1027) is, that the collector of assessments and arrears, under the direction of the comptroller, may cause the lands to be sold at public auction for the lowest term of years at which any person or persons shall offer to take the same in consideration of advancing the taxes, assessments and water rents, and interest thereon to the time of sale; and (Sec. 1041) that if such lands be not redeemed from such sale a lease shall be executed for such term

of years as the same shall have been sold, and that all such leases "shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessments on said lands and tenements for taxes or assessments or water rents, * * * were regular and according to the provisions of the statute in such cases made and provided."

The provisions of the charter, whereby the lien is made perpetual, is as follows:

> "All taxes and all assessments for local improvements and all water rents, and the interest and charges thereon, which may, in the City of New York, as by this act constituted, hereafter be laid or may have heretofore been laid, upon any real estate now in said city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges."

This latter provision (Sec. 1017) is held by the Supreme Court, General Term, First Department,

> "designed according to its express language to continue the lien of the assessments in force until actual payment should be made of the amounts as distinguished from a mere presumption of payment,"

and the lien was held to be an existing one after the lapse of more than twenty years from the time at which it attached.

Daly v. *Sanders*, 9 N. Y. St. Rep., 794.

As evincing that, so far as in that behalf a prerequisite to their resort to equity, plaintiffs had exhausted their statutory remedies, plaintiffs in and by their petition averred, and upon the hearing thereof made proof of the timely presentation in proper form, of their objections to and protests against each of the said respective assessments, as being unfair, unequal, inequitable and unjust (pp. 6, 7, 25, 36), and upon the trial thereon in the Supreme Court it was "conceded that on the filing of objections by petitioners, petitioners offered to introduce evidence showing that the physical condition of the road was the same as it is shown to be by the evidence in this proceeding, and that the board stated it was unnecessary to introduce such evidence at that time, as they knew such to be the physical situation of petitioners' land, and on that ground declined to receive such evidence" (p. 23).

It was also proven and undisputed that under and in pursuance of previous agreement still in force between the city and the plaintiffs the said railroad tracks and surface of the right of way grounds of plaintiffs had been placed and were required to remain at the alleged depth below the grade of said avenue and bounded by retaining walls and fence with the intent and to the effect of rendering access from either to the other impossible at any and all points along the line and within the

bounds of the improvements for which the said respective assessments were so laid and imposed (pp. 13, 14, 15, 19, Map, p. 139, and Exhibit G, opp. p. 11).

The land lying westerly of the railroad and cut off by it from access to this avenue obviously could not be specially benefited by improvement of such inaccessible avenue.

The conclusive evidence of impossibility of benefit resulting to this railroad property by the improvements of this avenue, consisting of the character and use of the property and its physical relations to the avenue, rendering access from one to the other impossible, was supplemented by the uncontradicted testimony of the witnesses Arthur Haviland (pp. 15, 16, 17), and Edgar Van Etten (pp. 19, 20, 21), to the effect that the property assessed was not specially benefited by these improvements of the avenue in any respect or sum whatsoever.

If and in so far as the official reports of the board of assessors might be deemed of force or effect to meet the evidence presented by the plaintiffs, those reports are effectively shown not to be entitled to substantial consideration or weight, because, notwithstanding the peculiar and especial considerations demanded by the nature, character and relative situation of this railroad property, as regards the avenue, and the improvements thereon, the uncontradicted testimony of the witness William H. Jasper, the then and for many years secretary of that board, establishes that no regard whatever was had to these peculiar conditions, and their existence in no wise considered; but, on the contrary, the properties abutting on the easterly side of the avenue were assessed in excess of the westerly side merely because and to the extent of the cost of additional curbing and flagging required for and placed upon the east side, more than upon the west side of the avenue, and, subject only to this exception, the respective assessments were apportioned, imposed and laid in conformity with the previously "fixed rule governing works," adopted by that board "that the area of assessments in improvements of this kind shall be each side of the street improved and for one-half a block on either side." That under and in obedience to this previously promulgated general direction or fixed rule of the board the commissioner of highways furnished his certificate of the area of the assessments, attached to a map thereof made by the surveyor who had charge of the work of the improvements. That, only in this most general sense, was it, that the area and apportionment of these respective assessments were fixed, and the map thereof made, under the direction and order of the board of assessors, and this certificate and map of area thereof, identical as to both assessments, accepted as showing the area and apportionment of assessment (pp. 22, 23, 24).

Having in advance, adopted a fixed rule of foot frontage, and half block each side area, to govern the laying and apportioning of assessments, and thereunder had the highway commissioner certify, and the surveyor map, the assessment area, regardless of varying abutting property conditions, uses and exigencies, the assessing board's carrying out of such arbitrary apportionment, or more properly speaking, refusal to apportion, was in keeping with the subsequent declination of the board to receive evidence of existing conditions of the property, in support of plaintiffs' objections to and protests against said assessments.

The petitioners contended before both trial and appellate courts that their property had not been, will not be, and cannot be, benefited in any manner by the improvements for which these assessments were laid. This contention is supported, first, by the physical facts above set forth, from which it is clearly apparent that there can be no benefit; secondly, by the evidence offered by the petitioners upon the hearing, and not disputed by the City; it did not controvert, or attempt to controvert, them, either by answer to the petition or by any evidence upon the hearing; the fact stands practically undisputed that the petitioners' property had not been, will not be, and cannot be, benefited in any manner, or to any extent, by the improvements for which these assessments were laid.

The petitioners also contended before the trial court and in both appellate courts that upon proof or concession of entire absence of special benefit from the local improvements the assessments should be vacated; and, that, if and so far as the statute (City Charter, Sec. 962) purported to deny to them that remedial right it was violative of their rights guaranteed by the Constitution of the State and by that of the United States (pp. 48–56).

The refusal of the Appellate Division to interfere with the determination of the Special Term was based solely upon the ground that the Court had been deprived by Section 962 of the Greater New York Charter of the right to grant the prayer of the petitioners and to vacate the assessments, that "the court is given the power to reduce an assessment, but deprived of the power to vacate it. It may correct an error, but it cannot entirely wipe out the assessment itself" (pp. 40 to 43). The Court of Appeals affirmed "on opinion below" (p. 56).

Thus the case alleged in plaintiffs' complaint, and established by the evidence is that of assessments, each by the charter provision constituting a perpetual colorable lien, apparently, upon the face of the records thereof, in all respects regular and valid; but, upon proof *aliunde* the record, shown, and practically conceded, in both trial and appellate courts, to be based upon conditions of fact rendering them wholly unauthorized

and void; and refusal of the State courts to vacate these assessments and adjudge them void solely by reason of the State statute purporting to forbid exercise of the jurisdiction in that behalf invoked.

FIRST POINT.

The right of an owner to hold and dispose of title to property free of unfounded and unjust cloud or restraint, is, in and of itself, property within and the subject of protection of the Federal Constitution.

The right and power of the reasonably free and untrammelled disposal of property is in itself property, and as manifestly the subject of constitutional protection as is the physical thing to which such right pertains.

The respective words *life*, *liberty* and *property*, as used in the Fourteenth Amendment of the Constitution of the United States are each used in the broad and popular sense, and not in a cramped or restricted sense.

The case of *Wynehamer* vs. *The People*, 13 N. Y., 378, presented among other questions, that of the constitutionality of the act "to prevent intemperance, pauperism and crime," in that it interfered with the disposal of that class of property to which the act had reference.

The Court of Appeals, speaking upon this subject, by Comstock, *J.*, at page 396, says:

> "Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature, property did not exist at all. 'Every man might then take to his use what he pleased, and retain it if he had sufficient power, but when men entered into society, and industry, art and sciences were introduced, property was gained by various means, for the securing whereof, proper laws were ordained.' (Tomlyn's Law Dic., Property; 2 Bl. Comm., 34.) Material objects, therefore, are property, in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are fundamentally the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression, destroys the notion of property, although the things themselves may remain physically untouched.

"Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Comm., 138), 'The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Comm., 320), 'The exclusive right of using and *transferring* property, follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326), 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' By another author property is defined as an 'exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or giving them away to any other person without consideration, or even throwing them away.' (*Bouvier Law Dic. tit. Property.*) These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made."

The same Court, in the case of *Matter of Jacobs*, by Mr. Justice Earl, says:

"The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property." * * * "Blackstone, in his classification of fundamental rights, says: 'The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution, save only by the law of the land.' (1 Com., 138.) In Pumpelly *vs.* Green Bay Co. (13 Wall., 166, 177), Miller, *J.*, says: 'There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution.' In Wynehamer *vs.* People (13 N. Y.,

378, 398), Comstock, *J.*, says: 'When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power.' In People *vs.* Otis (90 N. Y., 48), Andrews, *J.*, says: 'Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision.'"

Matter of Jacobs, 98 N. Y., 98.

And again, by Mr. Chief Justice Ruger, as follows:

"We do not think it is competent for the legislature to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the State for relief.

If, as we have seen, he is denied all remedy for the wrong inflicted upon him, the deprivation of his property becomes just as effectual as though it had been taken from him by direct legislative enactment." * * * "A statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another. (*Matter of Jacobs*, 98 N. Y., 98, and authorities there cited.) In the one case it despoils the owner directly, and in the other renders him defenseless against any assault upon his property.

Authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional provision as when it attempts to do the same thing directly."

Gilman vs. *Tucker*, 128 N. Y., 190.

The Supreme Court of Wisconsin, speaking upon this subject, says:

"Any restriction or interruption of the common and necessary use of property that destroys its value or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the Constitution."

Janesville vs. *Carpenter*, 77 Wis., 288.

Mr. Justice Bradley, in his dissenting opinion in the case of *Campbell* vs. *Holt* (115 U. S., at page 630), speaks of the Fourteenth Amendment as follows:

"That clause of the amendment which declares that 'no State shall deprive any person of life, liberty or property without due process of law,' was intended to protect

every valuable right which a man has. The words life, liberty and property are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term 'property,' in this clause, embraces all valuable interests which a man may possess outside of himself, that is say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right." * * *

"Remedies are the life of rights, and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away."

And this Court, by Mr. Justice Miller, says of it the following:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Pumpelly vs. *Green Bay Company*, 13 Wall., 166.

In *Marbury* vs. *Madison*, 1 Cranch., 137, this Court, speaking by Mr. Chief Justice Marshall, at page 163, announces the following:

"The very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, p. 23, Black-

stone states two cases in which a remedy is afforded by mere operation of law.

'In all other cases,' he says, 'it is a general indisputable rule that where there is a legal right there is also a legal remedy by suit, or action at law, whenever that right is invaded.'

And afterwards, p. 109, of the same volume, he says, 'I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

As is tersely stated by Campbell, *Ch. J.*, in announcing the unanimous decision of the Supreme Court of Colorado:

"Property, as such, has no claim upon the protection of the law. When a property-right is spoken of, the right of some person over or concerning the property is meant. All rights recognized by the law pertain to persons, natural or artificial. The absolute rights are commonly designated as personal rights. They are such as are annexed to the person, like life and reputation, while property rights are those unconnected with the person, but which, none the less, belong to some person. All rights, both those spoken of as personal and those denominated as property rights, belong to the individual citizen; and when it is said that property rights must not be infringed, what is meant is merely that the right of some person to or concerning property must not be interfered with."

Re Morgan, 26 Colo., 415; 47 L. R. A., 52, 56.

Direct and immediate prejudice to petitioner The New York Central and Hudson River Railroad Company appears in that it must take the risk of a forfeiture of its lease, which provides that

"It will pay the taxes, charges and assessments, ordinary and extraordinary, that may be imposed or assessed in any way on said railroad, branch, or property, or any part thereof, or upon or against the said party of the first part by reason thereof" (page 5 of the lease; p. 25, Ex. 7.)

Although the assessments here complained of are absolutely void, yet if the owner or lessee should enter into a contract to convey its interest in the lands upon which the assessments are imposed, free and clear of incumbrances, the vendee would be justified in rejecting the title, on account of these assessments.

Chase vs. *Chase*, 95 N. Y., 373.
Moore vs. *Williams*, 115 N. Y., 586.
Webster vs. *Kings County Trust Company*, 145 N. Y., 275.

In the *Chase* case it was held that a vendee could be compelled to accept the title solely upon the ground that the Court of Appeals had *In the Matter of Deering*, 85 N. Y., 1, declared the entire assessment void. The inference is that if it had not already been declared void by the Court of last resort, the vendee in the *Chase* case would have been justified in rejecting title. The assessment involved in that case was void upon its face. Much more would the vendee be justified in rejecting the title by reason of the assessments complained of here.

In *Maupin* on "*Marketable Titles to Real Estate*," Section 283, it is said:

"A purchaser of lands can never be required to accept a doubtful or unmarketable title, even though the fullest indemnity be offered by way of a general warranty from a solvent vendor. * * * If there is such doubt as to make it probable that the purchaser's right may become a matter of investigation, he will not be compelled to complete the purchase. * * * If a defect appear, and the title depends upon facts removing it, which facts the purchaser can only establish by parol testimony, should his title be afterwards attacked, the purchaser will be relieved."

See the cases cited under this section.

The same author further says, in Section 289:

"It has been frequently held that if parol evidence should be necessary to remove any doubt as to the validity and sufficiency of the vendor's title, the purchaser cannot be compelled to complete the contract. He cannot be required to take a doubtful title which he must fortify, if impugned, by resorting to evidence perishable in its nature, and possibly unavailable to him when the necessity for it occurs."

See *2 Beach's Modern Equity Jurisprudence*, Section 268.
Seamon vs. *Delancey*, 1 Hopkins (N. Y.), 436.
Moore vs. *Williams*, 115 N. Y., 586.
Irving vs. *Campbell*, 121 N. Y., 353.
Murray vs. *Harway*, 56 N. Y., 337.

The same author, in treating specifically of the incumbrances upon premises which will justify a purchaser in refusing to go on with the purchase until the objection be removed, divides such incumbrances into two classes:

(1) Those in which the existence of the incumbrance is admitted, or free from doubt; and (2) those in which the fact of existence of the incumbrance is a matter of doubt or dispute. The assessments complained of belong to the second class, and in Section 306 the author says:

> "Neither will the purchaser be compelled to complete the contract when the existence of the incumbrance, or its extension to the purchased premises, is a doubtful question of law or fact."
>
> "The rule that the purchaser cannot be compelled to take a doubtful title applies as well where the doubt is as to the existence and enforceability of the incumbrance upon the premises as where the doubt is as to the existence of some fact, or the construction of some instrument upon which the title is founded."

See *Garnett* vs. *Macon*, 6 Call (Va.), 308, 369.
Rose vs. *Calland*, 5 Ves., 189.

SECOND POINT.

Bills to remove clouds upon title, founded upon instruments or proceedings valid upon the face thereof, and their invalidity provable only by evidence *aliunde*, are remedies the right to which ante-dated the State organization, and the existence thereof and right thereto was and is recognized and sanctioned in its organic law.

By way of preliminary observation we submit that the fact, if it be a fact, that the State Constitution purports to authorize the Legislature to enact the statutory provisions, the validity of which are here called in question, in nowise disposes of the questions presented, because, the State Constitution is as much as State legislation, subject to the rules for the protection of private property prescribed by the Federal Constitution.

> "It is well settled that a provision in a State Constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute. We are of opinion, therefore, that, as it regards plaintiff's case, this

restrictive provision of the Constitution of 1880 does impair the obligation of a contract."

Fisk vs. *Jefferson Police Jury*, 116 U. S., 131.

Or, if it be contended that the statute as enacted is not violative of the Federal Constitution, and that such violation results from the judicial construction which the State courts have given the statute, such contention does not tend to either oust the jurisdiction of the United States Supreme Court nor prevent it adjudging that the statute as thus construed is violative of the Federal Constitution.

"It is said, however, that it is not the validity of the Act of 1860 which is complained of by plaintiffs, but the construction placed upon that act by the State court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no State legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

Bridge Proprietors vs. *Hoboken Co.*, 1 Wall., 116, 144.

In the earliest reported New York case which we have found wherein the jurisdiction of the Chancellor was invoked for relief against a cloud on title, the case and opinion reported are as follows:

"This was a bill to set aside, and to have cancelled, a deed, purporting to have been executed on the 6th day of February, 1790, by N. Gorham and O. Phelps, to William Ewing, in fee, for undivided parts of certain lots of land lying in the County of Genesee, and recorded in the Clerk's office of that county, on the charge that it had been falsely and fraudulently altered.

The defendants were the infant children of Ewing, who was dead, and his wife, who had married the defendant Harford. The cause was put at issue and proof was taken of the fraudulent alteration of the deed; and the fraud was shown to be of a very gross kind, and clear, beyond all contradiction. It appeared from the pleadings and proofs that the defendants, Harford and his wife, had brought an ejectment suit upon the deed, which was tried at the Genesee Circuit, where the felonious alteration of the deed was made out to the satisfaction of the Judge and jury, and a verdict found for the tenant in possession. Since that trial these defendants had procured the deed to be proved by a very aged subscribing

witness, since dead, and to be recorded, and had threatened the prosecution of a new action of ejectment.

The cause was submitted upon the pleadings and proofs.

The Chancellor thought it too clear a case to need discussion, and directed that the deed, which was in Court, should be cancelled as being a fraudulent, forged and void deed, and that the defendants, and all persons claiming under them, should be perpetually enjoined from using the record of the deed as evidence of title, and that the decree should be binding upon the infant defendants, unless they should within six months after they respectively attained the age of twenty-one years, upon being served with process for that purpose, show to the Court good cause to the contrary. And, inasmuch as the defendants, Harford and his wife, had not rested satisfied with the trial in the ejectment suit, but had since procured the deed to be proved by a very aged subscribing witness, since dead, without notice thereof to the plaintiff, and had caused the deed to be recorded, they were ordered to pay costs of this suit to the plaintiff."

Bushnell vs. *Harford*, 4 Johns. Ch., 301.

Another early case, of this character, *Apthorpe* vs. *Comstock*, is thus stated (1 Hopk. Chancery, 143):

"The object of the bill in this cause was for relief against a deed of conveyance of lands alleged to be forged or fraudulent, or otherwise invalid, and for an injunction to restrain the prosecution of certain actions of ejectment grounded on the deed."

The decision of the Court of Errors upon it is reported in 8 Cowen's Rep., 386. It was again before the Trial Court and reported in 2 Paige Ch., 482, where the following announcement is made:

"The Chancellor: It is not necessary for me to examine the question whether this is a proper subject of equitable jurisdiction. This question was distinctly raised before Chancellor Sanford on the motion to dissolve the injunction in this cause and in the Court of Errors on the appeal from his decision. In both cases the jurisdiction of this Court was sustained. I have no doubt of the correctness of these decisions. But if I were of a different opinion, I am not at liberty to overturn the decision of the Court of Errors, which has now become the law of the case, on that point. I have looked into the several opinions delivered in the Court of Errors and find this question must have been passed upon by that Court. The jurisdiction of the Court in this case has been sustained on the ground of the alleged forgery of the deed to Enoch Comstock; or, upon the

charges in the bill, that it is now attempted to be used for the purposes of fraud; that the proof endorsed upon the deed whereby it was admitted to be recorded, was surreptitiously obtained by an imposition on the Commissioner and by perjury; that the deed remains a cloud upon the complainant's title and cannot be removed from the record, and that the title cannot be settled so as to prevent a multiplicity of suits without the aid of this Court."

Under authority of English Statutes and Colonial Ordinances the Court of Chancery of this Colony was established in 1683, to "have power to hear and determine all matters of equity and shall be esteemed and accounted the Supreme Court of this Colony." * * * "This Court until the Revolution was in the hands of Governors of the Colony when, by the Constitution of the State (adopted in 1777), it was recognized as a Court and a Chancellor directed to be appointed." * * * "The Court of Chancery was first organized *in this State*, March 16, 1778."

Laws of New York, 1813, page 494, note.

The State Constitution, adopted November, 1846, in force January 1, 1847, provided:

ART. VI. SECTION 3. "There shall be a Supreme Court having general jurisdiction in law and equity," and

ART. XIV., SECTION 5, provided that "jurisdiction of suits and proceedings" pending in the Court of Chancery on the first Monday of July, 1848, "shall become vested in the Supreme Court hereby established."

The above provisions of Art. VI. Sec. 3, were continued in the amendment of this article, framed by the Constitutional Convention in 1867 and adopted in 1869.

The Constitution, adopted in 1894, and in force January 1, 1895, contains a like provision, to wit: "The Supreme Court is continued with general jurisdiction in law and equity."

ART. VI. SEC. 1.

Under the said provisions of the Constitution of 1847, the Court of Appeals, at its March, 1849, term, held "That the Supreme Court, as now organized has the same jurisdiction as that Court formerly had, with the addition of the equity jurisdiction of the late Court of Chancery."

Sherman vs. *Felt*, 2 N. Y., 186.

The principle here invoked is aptly expressed by Mr. Chief Justice Marshall in *Cohens* vs. *Virginia*, 6 Wheaton, at page 384, where he says:

"While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction

which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say that this fitness furnishes an argument in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring whether the words of the instrument which purport to establish this principle, shall be contracted for the purpose of destroying it."

In *De Hart* vs. *Hatch*, 3 Hun, 375, the New York Supreme Court, General Term, Daniels, *J.*, writing, upon this subject, at page 380, says:

"By the provision required to be considered and construed in the disposition of this case, the only court of general jurisdiction thoughout the entire State was established. It provided that there should be a Supreme Court having general jurisdiction in law and equity. The terms used are so comprehensive, that they include all cases of every description in law and equity, from the most important and complicated to the most simple and insignificant, and they imperatively and positively establish the court with that extended jurisdiction. The language made use of, is, that there shall be such a court, having the jurisdiction declared; and that was given to it, not to be exercised or declined as the legislature might afterward provide or enact, or that body and the court combined should at any time elect, but for the purpose of being at all times maintained and preserved for the benefit of those who might be parties to controversies in either law or equity. The jurisdiction conferred upon the court, included both the power to entertain, progress, and, in the end, determine all civil actions, and

the duty also to do those things; and for that reason, suitors in such cases have the right to require them to be done. The jurisdiction was conferred for their benefit, and to secure and promote the stability and good order of the State. It was rendered permanent and uniform in its nature, and as those attributes are provided for it by the fair import of the Constitution, it has not been left to the legislature either to abridge or limit them by any interposition on its part. For, if anything of that kind can be accomplished by legislation, then the jurisdiction can be by law abridged and reduced; and that would so far nullify the provision that there be such a court as the Constitution has described, as such legislation might be made to extend. From the nature of the unqualified jurisdiction created, the legislature very clearly could not have provided that the Supreme Court should not have the power to entertain, hear and decide the case enumerated in the act of 1872. If that could be done, then the jurisdiction of the court would depend upon the legislature instead of the Constitution; and if it should be done, the court would no longer have general jurisdiction in law and equity, as the Constitution has provided that it shall have. If the legislature can declare that the court shall have no jurisdiction over one class of cases, it may do so as to all, and in that way the provision contained in the Constitution could be completely abrogated. A law of that description would hardly be claimed to be capable of being sustained; and yet the difference between such legislation and that embodied in the acts of 1872 and 1874, is neither substantial nor real. If the legislature cannot restrict the jurisdiction of the court, its inability results from the positive declaration contained in the Constitution, as to what its attributes and character shall continue to be; and that will prevent the same thing from being done by the combined action of the legislature and the court together. The court has no legislative authority, and no power to decline or refuse the jurisdiction provided for it by the Constitution. If it had, it might impair and abridge its jurisdiction so far as to render the tribunal comparatively useless, which, the Constitution had declared, shall be the most comprehensive in the State. Upon this subject, neither the court nor the legislature has any power of election whatever. The court exists solely under the Constitution, and while it does so, it must be what that instrument has declared it shall be: a court of general jurisdiction in law and equity. And that includes the authority, as well as the duty, of hearing and

deciding all actions of a legal or equitable nature; for the term, general, includes all."

And the Court of Appeals, by Rapallo, *J.*, says:

"The Constitution of this State (Art. 6, Sec. 12) continues in the Superior Court of the City of New York, and certain other courts, the powers and jurisdiction which they had at the time of the adoption of that article.

This provision, unquestionably, deprived the Legislature of all power to take from those courts any of their then existing jurisdiction." * * *

"We are of opinion that, as the Constitution declares that the jurisdiction shall remain in the court, the court itself cannot relinquish or transfer that jurisdiction, and that any act authorizing it so to do violates the constitutional provision. If this provision were intended solely for the protection of the court or its judges they might waive it; but we do not think it was so intended. It was, in our judgment, like the whole judicial system of the State, intended for the benefit of the people, and to secure to litigants a forum in which they might have their controversies adjudged. The jurisdiction which the Constitution preserves in the courts named is inalienable, and carries with it the corresponding duty on the part of those courts to exercise it, when called upon in proper form so to do. The constitutional provision protects the parties to an action, brought in either of those courts, in the right to require it to adjudicate the controversy between them."

Alexander vs. *Bennett*, 60 N. Y., 204.

And again, by Martin, *J.*:

"The Legislature is not vested with the power to arbitrarily provide that any procedure it may choose to declare such shall be regarded as due process of law. If it possessed that power, the guarantees of the Constitution would be rendered unavailing, and private rights of citizens would be within its absolute control."

Colon vs. *Lisk*, 153 N. Y., 188.

The Amr. and Eng. Encyc. of Law (2d ed.) states the following:

"Since the Constitution of its own vigor, and as the sole source of all delegated authority, vests the judicial power in designated tribunals, it follows that the essentials of jurisdiction there conferred are unalterable and indestructible, and can neither be increased nor diminished by the Legislature, nor can the inherent powers of courts thus established be abrogated or abridged."

6 Amr. & Eng. Encyc. of Law (2d ed.) 1048.

"Jurisdiction cannot be indirectly destroyed by depriving a party of the right to appeal to the courts for redress of a legal wrong."

Id. 1049.

The Supreme Court of Michigan, by Campbell, *J.*, says:

"It is within the power of the Legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights."

Brown vs. *Buck*, 75 Mich., 274.

In a case instituted in the Supreme Court of Tennessee, under the supposed authority of a legislative enactment purporting to confer upon the court original jurisdiction of such proceeding, whereas the Constitution provided that its jurisdiction should be appellate only, the court, in an opinion delivered by Caruthers, *J.*, says:

"Have we authority under the Constitution to exercise the powers here conferred; or, in other words, is this act of the Legislature constitutional? is the first question to be considered. We cannot, without a violation of the Constitution, to which we owe our existence as a court, and which we have sworn to obey, transcend the limits therein assigned to us. With every disposition to respect and obey the mandates of the legislative department of the government, we are bound to stay our hands when we reach the limits prescribed for us in the fundamental law. Beyond that we dare not go, no matter what authority may command. We cannot obey two masters where their commands conflict. The Constitution is the chart by which we must govern our official action."

The State vs. *The Bank of East Tenn.*, 5 Sneed, 573.

In *Commonwealth* vs. *Commissioners* the opinion of the Pennsylvania Supreme Court was delivered by Woodward, *J.*, who says:

"1. It is objected that the writ was issued out of this court whilst it was sitting in the Eastern District; and hence, it is argued, the Commissioners are not amenable to it.

The 5th Article of the Constitution establishes the Supreme Court, and invests it with a jurisdiction co-extensive with the State. The jurisdiction must exist at all times in its entirety. If this Legislature could suspend it for an hour in one part of the State, it might suspend it for a day or a month in another part, and thus virtually abolish it altogether. The jurisdiction was conferred by the whole people of the State for their own benefit, and is held in trust for them. They have given the Legislature

no power to suspend, abridge or annihilate it. The Legislature have divided the State into districts for the sessions of the court to hear arguments, and the arrangement has been acquiesced in as convenient for the business of the court; but there is not a word in the Constitution about districts of the Supreme Court. The Constitution speaks of districts for the Court of Common Pleas; but everywhere treats the Supreme Court as an institution of the State. If the legislation which divides the State into districts, for the sessions of the court, were to be held to limit the range of the court's writs to the district in which the court was sitting, it would be a palpable infraction of the fundamental law."

37 Pa. St. Rep., 237.

Guy vs. *Hermance* was an appeal from an order granting an injunction restraining the defendants from selling certain property in the City of San Francisco. On the 18th day of May, 1853, the Legislature of California passed an act entitled: "An Act to provide for the sale of the interest of the State of California, in the property within the water line front of the city of San Francisco." The defendants, in pursuance with the terms of the Act, were duly appointed Commissioners, to examine into, and make sale of such interest, and as such advertised the property of the plaintiffs for sale, in order to satisfy whatever interest the State of California might have therein.

Huydenfeldt, *J.*, delivered the opinion of the Court; Murray, *C. J.*, concurred. The opinion announces as follows:

"2. The Legislature cannot exercise judicial functions, and, therefore, cannot except one case, or one party, from the operation of a general rule of law, either as to right or remedy. That portion, therefore, of the act of May, 1853, entitled: 'An Act to provide for the sale of the interest of the State of California in the property within the water line,' &c., which prescribes that no injunction shall be issued against the Commissioners, is invalid.

3. The right of a party to have his title to land protected from a sale which might create a cloud upon it, was upheld by this Court in the cases of Smith *vs.* Morse, 2 Cal., 524; Shattuck *vs.* Carson, 2 Cal., 588. Judgment affirmed."

5 Cal., 73.

THIRD POINT.

Assessments for local improvements founded upon proceedings valid on the face thereof, but by evidence *aliunde* proven invalid upon grounds rendering the assessing authorities powerless to impose assessment, constitute clouds upon title within and subject to, the reason and principle governing such remedy.

This general doctrine as regards equity jurisdiction is thus stated in High on Injunctions (3rd ed.). Sec. 524:

> "The most generally recognized exception to the rule that equity will not interfere with the collection of the revenue because of defects or illegalities in the proceedings, is in cases where the proceedings, if not enjoined, would result in clouding the title to real estate. Thus, where the defect is not merely a formal one, but works a substantial injury to complainant's rights, resulting in a cloud upon his title, the injunction will be granted. And where the proceedings sought to be set aside are valid upon their face and extrinsic facts are necessary to be proven to show their invalidity or illegality, equity will interfere to prevent a cloud upon title." * * * * * * "And the jurisdiction to thus interfere for the prevention of a cloud upon title is regarded as pertaining to the well settled powers of equity, which will interfere to prevent such a cloud as tends to diminish the value of the property or cast a doubt upon the title."
>
> Sec. 525: "It is to be observed, however, that where the relief is sought to prevent a cloud upon title it will only be granted in those cases where the illegality or irregularity complained of exists *dehors* the record."
>
> Sec. 526. "In conformity with the general doctrine as already stated, it is held that where the record of the tax proceedings is *prima facie* valid, and extrinsic evidence is necessary to show its invalidity, so that there is no full and adequate remedy at law to correct an abuse of the taxing power, equity may properly interfere by injunction."

Jurisdiction in equity to grant relief against an assessment on its face apparently valid, but by evidence outside the record shown to be invalid, was deemed to be vested in the Supreme Court of the State without the aid of statute.

This conclusion is announced after full discussion and citation of numerous authorities by Masten, *J.*, speaking for the Supreme Court, General Term, in the case of *Lewis* vs. *City of*

Buffalo, 29 How. Pr. Rep., at pages 338 to 344. The jurisdiction is recognized and the facts necessary to entitle complainant to relief under this head are stated and discussed at length in *Scott* vs. *Onderdonk*, 14 N. Y., 9, and *Haywood* vs. *City of Buffalo*, 14 N. Y., 534.

Following the principle of the above cases, the rule thereof is stated by Mason, *J.*, speaking for the Court of Appeals in *Allen* vs. *City of Buffalo*, 39 N. Y., at pages 390, 391, to wit:

> "the rule being, that, when the claim of the adverse claimant to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved to establish the illegality or invalidity, then a court of equity will interpose to remove the cloud. (*Ward* vs. *Dewey*, 16 N. Y., 519, 522; *Scott* vs. *Onderdonk*, 14 *id.*, 9), and I am not able to distinguish the case of *Scott* vs. *Onderdonk*, from the case at bar. It decides the very question presented by this appeal, and I cannot think it has been overruled by this court. The case of *Howell* vs. *The City of Buffalo* should not be regarded as overruling the case of *Scott* vs. *Onderdonk*, as it certainly would overturn the well-settled rule in equity, and overrule a long line of decisions in this State, without reviewing or considering them, and as the case has been withheld from the reports we ought to follow the case of *Scott* vs. *Onderdonk*, which is sound, and fully sustained by the prior cases."

These cases and the fundamental basis thereof as to the source of authority for the jurisdiction exercised therein, are recognized as controlling in the recent case of *County of Monroe* vs. *City of Rochester*, 154 N. Y., 570, wherein Judge Gray writing for an unanimous court, says:

> "Preliminary it may be remarked, with reference to such an action as this, which collaterally attacks the assessment, that it comes under that head of equity which awards relief when the object is to remove a cloud from the title. Judge Folger, in *Marsh* vs. *City of Brooklyn* (59 N. Y., 281), stated the conditions, which entitled the party to invoke the aid of a court of equity, to be 'when the claim or lien purports to affect real estate and appears on its face to be valid; when the defect in it can be made to appear, only, by extrinsic evidence, which will not necessarily appear in proceedings by the claimant thereof to enforce the lien.' This rule, often stated in this Court since the case of *Scott* vs. *Onderdonk* (14 N. Y., 1), and carefully reviewed in *Guest* vs. *City of Brooklyn* (69 N. Y., 506), is well established. The rule is applicable to such a case as this; but the extrinsic evidence, resorted

to in aid of the action, must show the defect relied upon to be one affecting the jurisdiction of the municipal officers and, hence, invalidating the claim to hold the plaintiff's property for the amount of the assessment imposed upon it. * * * What is essential to the maintenance of the action is that the assessment was illegal and that the illegality can only be made to appear by extrinsic evidence. If the municipal officers have acted within their jurisdiction in making the assessment complained of, that the evidence makes it appear to be disproportionate does not prove, necessarily, that an erroneous rule was adopted.

"Referring to the evidence in this regard, we find that, whereas the ordinance of the Common Council described, as the portion of the city which was deemed benefited and proper to be assessed for the whole expense of the improvement, the entire first ward and all of a certain described portion of the second ward and required that the reassessment to pay for the improvement should be made by the assessors upon the property described, the facts disclose that the assessors allowed themselves a latitude of authority in excess of that conferred and undertook to make exemptions with respect to the properties within the territory of assessment." * * *

"The plaintiff was justified in coming into a court of equity; there to show the illegal nature of the assessment by extrinsic evidence, and we think that the order appealed from should be affirmed."

That case is also suggestive, in the event that counsel for the City shall, notwithstanding the attitude of the State courts in that regard, argue here, as he did in his brief in the State courts, that the uncontradicted testimony of two witnesses ought not to be deemed sufficient to establish the fact of absence of benefit and thus impeach the return of the assessing officers, because "If such theory were to prevail, the courts would have to vacate every assessment made in the City of New York." The case cited, both as reported at general term (88 Hun, 165–167), and in the Court of Appeals (154 N. Y., 580, 581), shows that the evidence *dehors* the record upon which the Court acted in finding that the assessing board transcended its jurisdiction, consisted solely of the testimony of one assessor, called and sworn as a witness in behalf of the party impeaching the official acts of the assessing board, of which this witness was a member, and had, as such, under oath, participated in the performance of the service, and making of the return, which, by his oath as a witness, was deemed successfully impeached, and judgment was rendered accordingly.

The rule thus recognized as established, and applied generally throughout the State elsewhere than in New York City shows that the relief demanded by petitioners herein was denied not for want of jurisdiction vested by the Constitution in the court, of and concerning this subject matter, but solely because of the supposed validity of the statute provision purporting to inhibit exercise of that jurisdiction as regards assessments imposed within that city.

The rule to the contrary of that here acted upon in this regard is tersely stated by Mr. Chief Justice Chase in the case of *Cowles* vs. *Mercer County*, 7 Wall., 118, 122, as follows:

> "No statute limitation of suability can defeat a jurisdiction given by the Constitution."

The Supreme Court of the State having been given by the State Constitution jurisdiction of the subject matter in question, complainants in and by their petition filed therein invoked exercise by that Court of the jurisdiction thus vested in it.

The rule as to what is requisite for such purpose is cogently expressed by Ranney, *J.*, delivering the opinion of the Supreme Court of Ohio, in the following language:

> "The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected, that such complaint has been actually preferred; and that such person or thing has been properly brought before the tribunal, to answer the charge therein contained. When these appear, the jurisdiction has attached; the right to hear and determine is perfect."
>
> *Sheldon vs. Newton*, 3 Ohio St., 494, 499.

The Court was given, by the organic law which created it, jurisdiction of and capacity to entertain the complaint against the person or the body corporate sought to be affected; such complaint was preferred, alleging infirmities in the assessment proceeding rendering them invalid, and such infirmities as were by their very nature foreign to the facts to be officially recorded, could only be made to appear by evidence outside of the record, and praying proper relief against them; and, the parties in interest were properly brought before the Court to answer that charge. Manifestly the ground upon which the Court denied relief was that it held valid the legislative enactment, purporting to take from the Court the jurisdiction which the State constitution had vested in it. As thus decided upon and adjudged, the statutory provisions complained of operate

to deprive plaintiff of its property "without due process of law" and contrary to "the law of the land," by depriving it of the attributes and qualities which constitute the value of the property.

The difference is of form and not of substance, between the imperial *fiat* which of its own force at once wholly confiscates, and the assessment which, confessedly invalid, but upon its face apparently valid, constitutes a subsisting lien of which the owner may never in anywise rid it, and which the assessing power may eventually enforce with interest and penalties, by simply waiting until witnesses shall no longer be found who can testify to the facts rendering the assessment invalid.

FOURTH POINT.

Protection or remedy available only when the pretented assessment is sought to be enforced, coupled with the right of the assessing authority to hold the apparent lien thereof, delay enforcement until and execute it when testimony to prove its invalidity has been outlived, is not adequate protection or remedy.

The case presents plainly the fact that the refusal of the State Courts to exercise the jurisdiction invoked and grant the relief demanded was not by reason of either lack of proof of the facts alleged or of any failure or supposed failure of the State Constitution, the source of the authority and powers of those courts, to vest and continue in them the jurisdiction which plaintiffs invoked exercise of in their behalf.

The opinion of the Appellate Division, announced by Hon. McLaughlin, *J.*, contains, among other, the following:

> "The petitioners contended, in the court below, as they did upon this appeal, that their property upon which the assessments were levied is held and used solely for railroad purposes; that there are no buildings or improvements upon it, except railroad structures; and that it is not, and will not be benefited by the improvements, and therefore, the assessments are illegal. The conclusion at which we have arrived, renders it unnecessary to determine whether the petitioners' property is, or will be, in fact benefited by the improvements, for if that fact be conceded, it does not in and of itself entitle them to have the assessments vacated." * * * *

"It is not claimed that the assessments should be set aside on the ground of fraud, but it is insisted that 'substantial error' was committed; that, the improvements being of no benefit whatever to the petitioners' property, there was no basis for the assessments, and no authority under the statute to impose the same. On the other hand, the respondent contends that, under Sec. 962 of the charter, the court has no power to vacate an assessment for local improvements. Sec. 962 reads as follows: 'No court shall vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property for any local improvement otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents, by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value or fair cost of any local improvement, with interest at the rate of three per centum per annum from the date of confirmation to the final order of reduction, and seven per centum thereafter, be disturbed for any cause. The provisions of this section shall apply to actions to recover money paid for assessments and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement.' These two sections of the Charter are somewhat inconsistent, and in some respects, repugnant to each other; but, in order to ascertain the legislative intent, they must be read and construed together, and when this is done, it seems to us clear that the purpose of the two sections, and the object sought to be accomplished by them, was to deprive the court of the power, 'in any event,' to vacate an assessment for local improvements. To hold otherwise, the plain meaning of Sec. 962 must be disregarded, and the following words eliminated therefrom: 'No court shall vacate * * * any assessment in fact or apparent, whether void or voidable, on any property for any local improvement.'" * * * * * * * The amendment does not validate an illegal assessment, but it does narrow a special remedy so that it no longer covers that particular wrong, and remits the injured party to the ordinary remedies of the citizen generally, except that a bill in equity to vacate the assessment or to remove it as a cloud on title is forbidden (Laws of 1882, chap. 410, paragraph 897). The property owner may still challenge the validity of the assessment whenever his property is seized under it, or it is made the foundation of proceedings against him. It is again urged that the amendment was intended to reach, and must be con-

strued to cover, only cases of irregularity or fraud in which an original authority to make the assessment existed, and not to those in which there was no such authority. The language of the section does not permit such a construction" (p. 42).

This judgment was affirmed by the Court of Appeals "on opinion below" (p. 56).

The result is the conclusive exclusion of every possible inference other than that the refusal of the State courts to exercise their invoked jurisdiction and award the demanded remedy, was, as the Court avowed, solely by reason of and in obedience to the supposed authoritative mandate of this legislative enactment purporting to forbid the exercise of any jurisdiction, and the granting of any remedy in the like premises; and, that the judgment against plaintiffs on the merits, resulted from the State Courts holding and enforcing as valid the legislative enactment, the purport whereof was to inhibit the granting of any remedy for the protection of plaintiffs' property rights of holding and disposing of their property free of any cloud thereon for and during such indefinite period of time as the City of New York might defer attempt to enforce against it a demand known to be unenforceable so long as witnesses are living by whom the facts as to its invalidity might be proven; to the end and effect that finally such confessedly invalid demand may be fully enforced notwithstanding such invalidity thereof, because by lapse of time and death of witnesses plaintiffs will have become deprived of the means of proving the facts showing such invalidity of said demand.

The constitutionality of this enactment as affecting plaintiffs' said property rights was called in question by plaintiffs in and by their objections to said assessments before the Board of Assessors (pp. 35, 36); and, in and by their petition to the Supreme Court (pp. 6, 7); and in and by the evidence by them adduced in support of their said objections and petition (pp. 15, 16, 19, 20, 23); and in and by their briefs submitted at and upon the hearing of said cause in and before the Supreme Court, Appellate Division (pp. 48, 49); and at and upon the hearing of said cause in and before the Court of Appeals (pp. 51–56).

Giving force to the foregoing provisions of the greater New York charter, they operate to lodge upon property an invalid but apparently valid lien for the amount of the assessment, of which the owner is powerless to relieve it otherwise than by submission to its injustice. He may not either pay the money and sue for its recovery upon the ground of the invalidity and injustice of the charge, nor have any proceeding whatsoever to test its validity unless and until the municipality makes sale

of his property, in which event the supposed title of the purchaser claiming under the sale may be resisted.

If, as in the case at bar, proof of the facts showing the invalidity and injustice of the assessment, rests in the knowledge and memory of witnesses, all that is necessary for the municipality to do is to wait until those witnesses have joined the silent majority, and then proceed unhampered to complete the unwarranted subjection of the property to satisfaction of the lien.

This condition of affairs naturally suggests the inquiry of what avail to the land owner is the provision of the Federal Constitution that his property shall not be taken without due process of law, if that shall be deemed due process of law which nevertheless coerces him into payment of an unfounded but colorable charge, by subjecting him to the alternative of either making such payment, or suffering deprivation of the right and power of disposal of his property, for and during such period of time as his adversary may be pleased to defer subjection of the property to payment thereof, with the intent and to the effect of ultimately subjecting the property to payment of such unjust charge by reason of the owner being no longer able to produce witnesses to prove the invalidity thereof.

FIFTH POINT.

"It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision" (*Cohens* v. *Virginia*, 6 Wheaton, 264, 399). **"A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has the force of an official utterance"** (*Colonial, &c., Co.*, v. *Kingston R. R. Co*, 154 N. Y., 495). **Subjection to this test shows the authorities relied upon for the judgment herein failing to afford it support.**

Comment under this point requires a view somewhat in detail of the successive legislative enactments and the adjudications based thereon, whereby the remedy here demanded is

deemed, by the state courts, to have been denied to complainants. Such comment may possibly be somewhat simplified and its appreciation aided by preliminary statement of certain general principles germane to the subject matter thereof, which, although in such degree fundamental and elementary as to dispense with necessity of citation of authorities in support thereof, reflect the light in which these enactments and the state court adjudications based thereon should, as we think, be considered.

1. The making of local improvements and the assessment of all, or a proper and just share, of the cost thereof upon property duly ascertained to be specially benefited thereby, in proportion to such special benefit, is in the nature of a proceeding *in rem*, requiring, as regards notice to the owner, prerequisite to jurisdiction of the subject matter, such notice, actual or constructive, as, while under all ordinary conditions reasonably informs the land owner of the nature of the proceeding, and of his time and place of hearing thereon, is also consonant with the efficient exercise of such power.

2. The legislature acting directly, or the officer, board or tribunal upon whom the power of assessment is delegated, possesses and must exercise that power subject to the jurisdictional limitation that the individual assessment shall not be manifestly and in material degree inequitable, and shall not be in substantial excess of the special benefit evidently resulting to the assessed property from the local improvement, the cost, or a portion whereof, is thus assessed against it.

3. If and in so far as local assessment statutes, or proceedings thereunder, grant, provide or accord to property owners other and further notice, hearing, right or privilege in or incident to, or limitation upon the exercise of, such power of local assessment, these additional rights and limitations are thus granted and accorded as matter of favor only, and not of strict inherent property right; and the statutory provision therefor may, in proper case, be deemed directory merely, and not mandatory.

4. If and so far as statutory provision, or proceeding thereunder, have provided for or accorded to property owners in local assessment proceedings, notices, rights or privileges therein or incident thereto, or limitations upon the exercise of power thereof, of the character of mere favor only, it is competent for the legislature, in and by either previous, concurrent or subsequent enactment, to provide that failure of observance of such provisions of favor merely shall not constitute ground or reason whereon the party thereby aggrieved may ask the courts to vacate or modify the assessment or the apparent lien thereof.

5. Judicial decisions, upholding legislative enactments, to the effect that the lien of local assessments shall continue until the actual payment thereof; that any local assessment shall not be vacated or reduced; that this provision or rule shall apply to and govern actions to recover money paid for assessments; and that no suit or action in the nature of a bill in equity, or otherwise, shall be commenced for the vacation of any assessment or to remove a cloud upon title, in, and as applied to actions where the ground upon which relief is sought is the violation or non-observance of prescribed rights or limitations of mere favor only. do not constitute authority to sustain the same or like legislative enactment where it amounts to denial of remedy for violation or non-observance of fundamental property right expressly protected by the organic law to which the very power of assessment is subject.

In the light of these preliminary observations we proceed to a presentation of the legislation, and judicial decisions thereon, upon which the corporation counsel contended in the State courts, and those learned courts sustained the contention that; conceding the facts to be as claimed by petitioners; conceding that petitioners' property is wholly without benefit from these local improvements; conceding that for that reason the assessments are wholly void; nevertheless, the court is without power to vacate the assessment or to adjudge or hold it void, in this proceeding or in any suit or action in the nature of a bill in equity or otherwise.

The legislative enactments to be here considered are the following, to wit:

1. Chapter 338 of the Laws of 1858, entitled "An Act in relation to frauds in assessments for local improvements in the City of New York."

Sections 1, 2 and 3 of this Act are as follows:

"SECTION 1. If in the proceedings relative to any assessment or assessments for local improvements in the city of New York, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the supreme court, in special term or in vacation, who shall thereupon, upon due notice to the counsel of the corporation of the city in which the lands so assessed are situated, proceed forthwith to hear the proofs and allegations of the parties."

"2. If, upon such hearing, it shall appear that the alleged fraud or irregularity has been committed, the said assessments shall be vacated, and the lien created thereby, or by any subsequent proceedings, shall cease."

"3. On the production of the certificate of the judge,

before whom the proceedings shall be had, that a judgment vacating any assessment has been made by him, it shall be the duty of the officer having charge of the assessment lists to cancel thereon the assessments so vacated, and all proceedings under the same."

It will be seen that this Act provides for a speedy and simple method of review in cases of alleged *fraud* or *legal irregularity;* and, in case they are found to exist, for vacating the assessments. The remedy here provided is not declared to be a substitute for any other existing remedy, nor is it accompanied by any prohibition against pursuing other remedies.

2. Sections 2 and 3 were amended by Chapter 312 of the Laws of 1874, being an act entitled "An Act in relation to taxes and assessment in the city of New York, and the collection and vacation thereof." By this amending act the above sections were made to read as follows:

"1. If, in the proceedings relative to any assessment or assessments for local improvements in the city of New York or in the proceedings to collect the same, any fraud or [legal irregularity] *substantial error* shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the Supreme Court, in Special Term or in vacation, who shall thereupon, upon due notice to the counsel to the corporation of the city in which the lands so assessed are situated, proceed forthwith to hear the proofs and allegations of the parties."

"2. If upon such hearing it shall appear that the alleged fraud or [irregularity] *substantial error* has been committed, the said assessment [s] shall be vacated, and the lien created thereby, or by any subsequent proceedings, shall cease, *and hereafter no suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the act hereby amended.*"

The words omitted are enclosed in brackets; the new words are italicized. The amending act makes no changes except those indicated. A suit or action in the nature of a bill in equity or otherwise is here for the first time prohibited. There was still no prohibition as to the *extent* to which any assessment might be reduced or vacated.

3. Chapter 550 of the Laws of 1880, being an act entitled "An Act relating to certain assessments for local improvements in the City of New York" provided for the general revision of certain assessments. Section 12 of this act is the only one which needs to be specially considered. It would seem,

however, that although this section 12 is general in its terms, it had some special reference to the assessments, special provision for the revision of which is made in the entire act.

Section 12 is as follows:

"12. No existing provision of law shall enable or permit any court to vacate or reduce any assessment in fact or apparent, hereafter confirmed, whether void or voidable, on any property for any local improvement in the City of New York hereafter completed otherwise than to reduce any such assessment to the extent that the same may be shown, by parties complaining thereof, to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause. Nothing in this section shall apply to any assessment which may be imposed for the local improvements known as Morningside Avenue."

This is the first statutory prohibition of any reduction except to the *extent* of increase by reason of the fraud or substantial error.

4. These provisions appear in the Consolidation Act as sections 897, 898, 900 and 903 as follows, this being the first time that all the statutory provisions on this subject were brought together and codified in one act, and here they are brought together under one *title* of such act:

TITLE 3.

Vacating and Modifying Assessments.

"897. No suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under this title." (A part of section 2, Chap. 338, L. 1858, as amended by section 2, Chap. 312, L. 1874.)

"898. If, in the proceedings relative to any assessment or assessments for local improvements, or in the proceedings to collect the same, any fraud or substantial error shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the supreme court, in special term or in vacation, who shall thereupon, upon due notice to the counsel of the corporation, proceed forthwith to hear the proofs and allegations of the parties. If, upon such hearing, it shall appear that the alleged fraud or substantial error, other than such errors as are specified

in the next section, has been committed as provided in this title, the said assessment shall be vacated or modified, and the lien created thereby, or by any subsequent proceedings, shall cease. If, upon such hearing, it shall appear that, by reason of any alleged irregularity, the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party may be modified by deducting therefrom such sum, as is in the same proportion to such assessment as is the whole amount of such unlawful increase to the whole amount of the expense of such local improvement." (A part of section 1 and a part of section 2, of Chap. 338, L. 1858, as amended by Chap. 312, L. 1874.)

"900. Any order vacating said assessments shall be entered in the office of the clerk of the supreme court, and on filing a certified copy thereof with the officer having charge of the assessment lists, it shall be the duty of said officer to cancel thereon the assessments so vacated, and all proceedings under the same; and the justice who shall have made such order may enforce the same, either by attachment for contempt or by writ of mandamus, or both, against any party refusing to obey the same, with costs."

Section 902 limited the application of Sections 898 to 901, inclusive, to certain proceedings.

"903. No *Court* [existing provision of law shall enable or permit any court to] shall vacate or reduce any assessment in fact or apparent, [hereafter] confirmed *after June ninth, eighteen hundred and eighty*, whether void or voidable, on any property for any local improvement [in the City of New York] hereafter completed otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof, to have been, in fact, increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause. Nothing in this section shall apply to any assessment which may be imposed for the local improvement known as Morningside avenue" *s*.

Omitted words in brackets, new in italics.

This section, 903, was so amended by chapter 613 of the laws of 1895 as to read as follows:

"Section 903. No court shall vacate or reduce any assessment in fact or apparent confirmed after June ninth, eighteen hundred and eighty, whether void or voidable, on any property for any local improvement thereafter

completed otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest at the rate of three per cent. per annum from the date of confirmation to the date of the final order of reduction and seven per cent. thereafter be disturbed for any cause. Nothing in this section shall apply to any assessment which may be imposed for the local improvement known as Morningside avenue; nor to any assessment laid in violation of the provisions of sections six hundred and seventy-two, eight hundred and seventy and eight hundred and seventy-five of this act, nor to any assessment laid for an improvement which is not by law the subject of local assessment. Provided neverheless:

1. In case the principle of apportionment of an assessment be erroneous, the court shall reduce the assessment on the lots of the petitioner aggrieved thereby to the lawful and just amount that ought to have been assessed thereon, or in its discretion, the court may set aside and annul the entire assessment and the record thereof and direct the assessment list to be returned to the board of assessors for reapportionment according to law.

2. In case any item or items forming part of the sum assessed be not by law the subject of assessment locally, the assessment shall be reduced to the amount lawfully assessable locally.

3. In case an assessment upon any lot exceeds one-half of the valuation of such lot made by the commissioner of taxes for the purpose of taxation, the court shall reduce the assessment on such lot to one-half of the tax valuation confirmed next previous to the completion of the improvement for which the assessment is laid."

5. These provisions are now found in sections 958, 959 and 962, Title 3 of Chapter XVII. of the charter, relating to taxes and assessments. It is not now necessary to notice the other sections of the Title, but the intent to codify and include in this title all the remedies and the procedure for reviewing local assessments is still further apparent. The Title is headed, and the three sections read as follows:

"TITLE 3.

Vacating and modifying Assessments *for local improvement Other than Those Confirmed by a Court of Record.*

Remedies Limited.

"Section 958. No suit or action in the nature of a bill

in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under this title."

This is Section 897 of the Consolidation Act without any change.

"Petition to the Supreme Court in Case of Fraud or Substantial Error."

"Section 959. If in the proceedings relative to any assessment or assessments for local improvements, or in the proceedings to collect the same, any fraud or substantial error shall be alleged to have been committed, the party aggrieved thereby may apply to a justice of the supreme court in special term or in vacation, who shall thereupon, upon due notice to the corporation counsel, proceed forthwith to hear the proofs and allegations of the parties. If, upon such hearing, it shall appear that the alleged fraud or substantial error, other than such errors as are specified in the next section has been committed as provided in this title, the said assessment shall be vacated or modified, and the lien created thereby, or by any subsequent proceedings, shall cease. If, upon such hearing, it shall appear that, by reason of any alleged irregularity, the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party may be modified by deducting therefrom such sum, as is in the same proportion to such assessment as is the whole amount of such unlawful increase to the whole amount of the expense of such local improvement. Any order that may be made by a justice under authority of this section shall be filed in the office of the county clerk of the county in which the lands are situated, and after the filing of a certified copy thereof with the officer having charge of the assessment, it shall be his duty to cancel or reduce the assessment as required by the order, or do any other act required thereby."

The foregoing section combines the provisions of Sections 898 and 900 of the Consolidation Act without material change, except to conform to the new conditions under the Charter.

Section 903 of the Consolidation Act, as amended, appears as Section 962 of the Charter as follows:

"Power of Court to vacate or Reduce Assessments Limited and Qualified.

"962. No court shall vacate or reduce any assessment in fact or apparent [confirmed after June ninth, eighteen hundred and eighty], whether void or voidable, or any

property for any local improvement [hereafter completed] otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment, which is equivalent to the fair value *or fair cost* of any *actual* local improvement, with interest *at the rate of three per centum* from the date of confirmation *to the date of the final order of reduction, and seven per centum thereafter*, be disturbed for any cause. [Nothing in this section shall apply to any assessment which may be imposed for the local improvement known as Morningside avenues]. *The provisions of this section shall apply to actions to recover money paid for assessments, and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement.*"

Omitted words in brackets, new in italics.

It is to be observed that this section and the other sections quoted from the Charter omit the provisions contained in the sections of the Consolidation Act restricting the application of these sections to certain proceedings; and secondly, that this section extends the restrictive provisions to actions to recover money paid for assessments.

Section 1614 of this charter provides:

"Section 1614. No right or remedy of any character shall be lost or impaired or affected by reason of this act. This act shall not affect or impair any act done or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to the time when this act takes effect or by virtue of any laws repealed or modified by this act, but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if this act had not been passed or said laws had not been repealed or modified," &c.

The cases cited by the Corporation Counsel, and some thereof also by the Court, as supposedly supporting the doctrine upon which the judgment here in question is founded, were the following:

The case, *Matter of Smith*, at Special Term, is reported in 67 How. Pr. Rep., at page 501, and a foot note (page 502) recites that it was "affirmed by general term, November, 1884, on foregoing opinion, no opinion being written by General Term." Its report for the Court of Appeals appears in 99 N. Y., page 424. The only ground of application for relief appears to have been that "the ordinance for the pavement in question was passed without authority of law (67 How. Pr., 502)," in

that "there was no petition by the property owners for the additional course" of flag stones "for which the assessment was made" (99 N. Y., 424). The Special Term, Lawrence, *J.*, says:

"I cannot distinguish this case from that of *Isabella Garvey* (77 N. Y., 523), but under the act, chapter 550 of the Laws of 1880, it would seem that the court is precluded from vacating the assessment; nor can I reduce the amount, because there is nothing by which I can determine the extent to which the assessment has been increased by reason of the fraud or substantial error. (*See decision of Court of Appeals in Matter of Mead*, 74 N. Y., 216.)" * * * "If the ordinance for the pavement in question was passed without authority of law, the execution of the work could have been prevented by appropriate application to the court. Not having availed himself of his legal rights in that respect, I think the petitioner is precluded by section 903 from asking to have the assessment vacated." * * * *

The opinion of Finch, *J.*, writing for the Court of Appeals, is as follows:

"The additional width of sidewalk for which the assessment was laid was a re-pavement within the construction heretofore adopted. (*In re Garvey*, 77 N. Y., 523.) That the existing width was left undisturbed, and a new strip added, making the flagging eight feet wide instead of four, as originally laid, does not alter the result. The sidewalk had been once paved upon a plan and of a width at the time deemed suitable, and that act exhausted the authority given, and left any new paving of the same walk to be governed by the statute which required as a condition precedent a petition of a majority of the property owners along the line of the improvement. (Laws of 1882, Chap. 410, Sec. 875.) The decision in *The Matter of Grube* (81 N. Y., 139) did not hold the contrary. There, the roadway had never been paved at all, on any plan or of any width, and the ruling was that there was no re-pavement of the roadway because the sidewalks had been flagged.

It follows that there was no authority for this assessment since the property owners rested contented with the pavement as originally laid, and made no petition for a change, or for the additional width, and the petitioner would be entitled to have the assessment vacated but for another and peremptory enactment which forbids.

The petitioner is pursuing his remedy under the provisions of the act of 1858 (Chap. 338) and its amendments. That is a special remedy. It was given in addition to and in excess of the usual and ordinary remedies of the citizen

in repelling an unlawful levy and resisting an illegal claim. It was speedy and summary; confined to one locality; and designed to remedy evils peculiar to that locality. It was a remedy which the legislature might give or refuse; and having given, might modify or limit at its pleasure. Originally very broad and covering a large class of cases, it was at a later period very much narrowed and restricted. (Laws of 1880, Chap. 550, Sec. 12.) That restriction took the form of a positive prohibition. It forbade any interference with the assessments through the operation of the special remedy as to all such confirmed after June 9, 1880, for any improvement completed after the date of the enactment, and whether such assessments were 'in fact or apparent,' 'void or avoidable,' except that they might be reduced to the fair value of the actual improvement made. For all assessments back of June, 1880, the special remedy remained unchanged, but from that time forward its sole possible application was to cases where the complaint could be redressed by reducing the assessment to the level of the just value of the improvement.

It is argued that this amendment did not repeal and was not intended to repeal the act which forbids a repavement without the consent of a majority of the property owners adjoining. That is true, undoubtedly. The amendment does not validate an illegal assessment; but it does narrow a special remedy so that it no longer covers that particular wrong, and remits the injured party to the ordinary remedies of the citizens generally, except that a bill in equity to vacate the assessment or remove it as a cloud on title is forbidden. (Laws of 1882, Chap. 410, Sec. 897.) The property owner may still challenge the validity of the assessment whenever his property is seized under it, or it is made the foundation of proceedings against him.

It is again argued that the amendment was intended to reach and must be construed to cover only cases of irregularity or fraud, in which an original authority to make the assessment existed, and not those in which there was no such authority. The language of the section does not permit such a construction. When it describes the assessments to which it applies not only as existing 'in fact,' but as merely 'apparent,' and not only as 'voidable,' but as 'void,' it carefully shuts the door upon any such limited construction; and lest the meaning should even then be doubtful, it adds that 'in no event shall that proportion of any such assessment, which is equivalent to the fair value of any actual local improvement with interest from the date of confirmation, be disturbed for any cause.'

The emergency which led to the act of 1858 is well understood. It was deemed to be of an exceptional nature, and for which a new and summary remedy was needed. The applications to vacate became numerous and crowded the appropriate tribunals. In 1880 when the restrictive amendment was adopted, a local tribunal was established (Secs. 906, 907, 908, 909, 910, 911), empowered wherever substantial injustice had been done by assessments confirmed before June of that year to revise, modify or vacate the same; the evident purpose being to mainly concentrate in the local tribunal the class of litigation provided for, and leave the special remedy confided to the court narrowed to the single case of assessments exceeding the honest and just value of the improvement.

The courts below were, therefore, right in determining that the special remedy invoked by the petitioner had no application to the case which he presented."

Matter of Mead, 74 N. Y., 216, arose in Brooklyn under a statute similar to the one now in the Greater New York Charter.

"The assessment in question was for grading and paving a portion of Seventeenth Street in said city. The lots of the petitioner were assessed at at $243.18 each. The value, as estimated by the assessor, was $100 each, and the ground of the application was that the assessors had no authority to assess the lots to more than one-half their value."

The Court of Appeals, Miller, *J.*, writing, says:

"The summary remedy by petition for relief from an assessment is a statutory one, and is, therefore, independent of any relief to which a party may be entitled by an equitable action or by a *certiorari* to review the proceedings in the Supreme Court." * * * * "Practical experience in large cities demonstrates that lots which from their location are inaccessible or unavailable, for any purpose, by reason of being far below the level of the land which surrounds them, or remote from an open public thoroughfare, are often increased very much in value by the opening of a street or by some other useful improvement, and it may well have been the case that the interest of the owners of the lots in question was substantially promoted by a large expenditure of money to make the necessary change, and that they thereby became available for use and correspondingly valuable. So long as the assessed party received an equivalent, the intention evidently was that the assessment should not be disturbed, whether it was strictly irregular or otherwise, or even if

fraud was shown, except to the extent provided by the statute last cited." * * * * * *

"The principle upon which a corporation tax for the improvement of real estate is founded is quite familiar and well understood. It is based upon the theory that the owner of the property assessed is to receive a benefit corresponding with the amount assessed, and that this is to be paid to meet the cost and expense of the improvement. It is, therefore, of no consequence what the value of the lots may be, provided the enhanced benefit is equal to the assessment. It is not made apparent from the record before us that there has been any departure from this principle, so as to affect the assessment within the enactment in question. Nor is there any ambiguity in the provision cited which indicates a departure from this doctrine."

Matter of Brainerd, 51 Hun, 380, affirmed without opinion, 117 N. Y., 623, is thus stated by Van Brunt, *P. J.*, writing for the General Term:

"The ground upon which it is sought to set aside this assessment is that the sewer was constructed without lawful authority, and that the assessment, therefore, is illegal and void, and that the petitioner is entitled to have it vacated of record. Mr. Justice Lawrence, who heard the motion in the Court below, clearly shows by his opinion that no such relief can be granted in this proceeding, and the views expressed in such opinion we adopt. That he arrived at the correct conclusion is evidenced by the decision of the Court of Appeals in the *Matter of Smith* (99 N. Y., 424), in a proceeding because there was no authority for the doing of the work for which the assessment was levied."

After quoting at length from the opinion in *Matter of Smith*, the learned Judge concludes:

"The ground upon which the assessment in the case at bar is sought to be set aside is precisely of the same character as that in the case cited; and under the principles laid down in that case in conformity with the statute, the appellant cannot avail himself of the peculiar facilities afforded by this statute."

In the case, *Matter of Chesbrough*, 44 N. Y. St. Rep., 586, the only ground of complaint was alleged error in the apportionment of the cost of the improvement, (a local sewer), whereby complainant's property was assessed in a relatively larger proportionate sum than other benefited property. It was not alleged that complainant's assessment exceeded the benefit resulting to his property from the improvement.

The holding of the Court was that it had no power under the

statute to direct re-distribution of the cost of the improvement on the property assessed.

Matter of Feust, 121 N. Y., 299, which was an assessment for regulating, grading, &c., Morris Avenue from 138th Street to 156th Street. The contract was let January 29, 1883, and completed December 6, 1883, and the assessment was made after Section 903 was enacted. The error or irregularity complained of was that the bid for the work was not preceded by proper estimate of quantity, and without distinction between rock and earth excavation, and that the excavation was very largely dirt, but was charged at a rate double the fair value for excavating rock, and it was shown how much the assessment exceeded in dollars and cents, by reason of this error or irregularity, the fair value of the work, and to the extent of that excess the assessment was reduced by the trial court, and that reduction was confirmed by the general term, and affirmed by the Court of Appeals.

In the *Matter of Cullen*, 53 Hun, 534, which was for the improvement of First Avenue, the assessment was confirmed July 20, 1885, and there was a serious error in the manner in which the contract had been relet, the first contractor having failed to complete his work, although he had received some portion of pay for the work. It was shown how much the assessment exceeded, by reason of this fraud or irregularity, the fair value of the work, and the assessment to the extent of that excess was reduced.

In the case of *Lennon* vs. *Mayor, etc.*, 55 N. Y., 361, the ground of the complaint was that the ordinance by and under which the assessment was imposed was not published and advertised previously, according to the charter of 1857. It did not appear but that complainant's property was benefited by the local improvement to the full amount of the assessment charged against him, nor that the expense of the improvement, or of his assessment therefor, had either thereof been in any measure increased by the errors complained of. The omissions complained of were of such matters of form in the method of procedure as the Legislature need not have provided for in the first instance, and so the only question before the Court was whether the Legislature properly might, as it did, provide that their omission should not be ground for invalidating the assessment. This was what the Court was called upon to, and did, pass upon, and the case is authority upon the question thus presented and decided.

In the case entitled *Matter of West*, reported in New York *Law Journal* of November 22, 1898, Vol. XX., No. 43, page 558, the assessment had been laid upon petitioner's property for his proportionate share of the full expense of constructing a sewer, which he claimed and the Court found, was con-

structed in pursuance of a statute by the provisions whereof only one-half of that proportionate share should have been imposed as a special assessment. Complainant sought to have a reduction of the assessment upon that ground, but was held not entitled to relief in that proceeding. For aught that appeared in the case the benefit resulting to his property from the improvement was fully equivalent to the amount of the assessment, and for that reason he was unable to bring himself within the provision of the statute regulating the proceeding prosecuted by him.

Tripler vs. *Mayor*, 125 N. Y.,617, and 139 N. Y., 1, was an action to have an assessment declared void and to recover back money paid on account thereof. The alleged infirmity in the assessment was that the work of the local improvement for which the assessment was laid, was done by day's work, and not by contract, without the requisite authorization by a three-fourths vote of the common council (125 N. Y., 623, and 139 N. Y., 3). The work was commenced in 1873, the assessment confirmed May 24, 1881, notice thereof published May 28, 1881, requiring

> "payment thereof on or before July 27, 1881, and stated that in default thereof interest would be added at the rate of seven per cent from the date of confirmation. The demand of payment required by statute was simply a published notice requiring the amount to be paid to the proper officer within sixty days, or the assessment would bear interest as stated.
>
> The plaintiff did not comply with the demand, and the city took no steps towards enforcing the payment of this assessment from that time forward.
>
> On the 29th of January, 1887, or nearly six years after the confirmation of the assessment, the city still remaining passive as to enforcing the same, the amount of the assessment laid on the plaintiff's land, together with interest, was paid to the clerk of arrears by the attorney for the person to whom the plaintiff herein had sold the property, out of the consideration money reserved for that purpose by the purchaser, and such payment was so paid to free and clear the premises from the lien and encumbrance of the assessment in accordance with the terms of sale and the deed from the plaintiff to the purchaser. This is the finding of the court as to the manner of payment and the person who made it."

Judgment in plaintiff's favor was upon the first review reversed because payment appeared to have been voluntary, and lack of knowledge of the facts invalidating the assessment had not been proven (125 N. Y., 625). The judgment in favor of defendant was reversed upon the second review, because it was

based upon a verdict directed by the court, and the reviewing court deemed the evidence upon this point of want of knowledge sufficient to entitle plaintiff to have it submitted to the jury (139 N. Y., 4).

The reason assigned, upon the first review of this *Tripler* case is interesting in its recognition of the right of the aggrieved party to resort to equity, to wit:

> "He has the right at once to commence his action to set aside the apparent lien of the assessment as a cloud upon his title, and to enjoin its collection, and he may do this before any step is taken toward enforcing the assessment. With such knowledge and with such right, if a person choose, nevertheless voluntarily to pay, it is no hardship to hold he cannot recover it back. In such case no reason exists for permitting him to pay it with full knowledge that the assessment is utterly void, and in the absence of any attempt on the part of the city to enforce payment, and in then allowing him to sustain such an action as this to recover back the money so paid. If the owner of the judgment, or the city, in case of the assessment, sought to enforce payment, the party might pay, even with knowledge, and still recover back. But one against whom a judgment is rendered, or upon whose land an assessment is laid, apparently valid, although in truth utterly void by reason of facts outside of the record, who pays it with full knowledge of those facts and without the slightest attempt to enforce payment of either the judgment or assessment cannot, in any just view of the case, be regarded as making an involuntary payment by coercion in law. If the judgment be so far valid as that it cannot be set aside in any other fashion than by a reversal for error, it is not within the principle I have stated. The facts must be outside of the record and must be of such a character as to render the judgment or assessment void."

If and so far as it appears or may be supposed that the complaints in these cases or any thereof wherein relief was denied were of sufficient scope to present a case for equitable relief, and invoked equitable relief thereon, it does not appear to have been alleged or proven in any one of them that the assessment appeared upon the face of the proceedings valid, and was by evidence *aliunde* shown to be in fact void, because not within the jurisdiction of the assessing power by reason of the fact that the assessed property was not and could not be in any respect or degree specially benefited by the local improvement, for the cost or share of the cost of which the assessment was imposed.

On the contrary, in each case, the infirmity relied upon for attack upon the assessment consisted of either a defect apparent

upon the face of the proceedings, or violation or non-observance of some one or more of the orderly steps in the proceeding, or of some limitation upon the right or authority thereof, which the legislature had prescribed as and in the way of mere favor only, not involving any fundamental jurisdictional right.

These cases and the defects therein respectively relied upon may be briefly summarized as follows: *Matter of Smith*, and *Matter of Brainerd*, no petition of property owners preliminary to the ordinance inaugurating the improvement. *Matter of Mead*, assessment exceeded fifty per centum of value at which the assessed premises were valued for the purposes of general taxation. *Matter of Chesbrough*, error in apportionment whereby complainants' assessment was larger in proportion to benefit than that imposed on certain other benefited property. *Matter of Finch*, and *Matter of Cullen*, cost of work excessive, measure of excess proven and assessments adjudged reduced. *Lennon* vs. *Mayor*, ordinance not published as charter provision required. *Matter of West*, assessment was complainants' proportionate share of total cost of improvement whereas statute provided but half the cost thereof should be raised by special assessment. *Tripler* vs. *Mayor*, improvement work was done by day's work, instead of by contract, without requisite authorization by three-fourths vote of common council. Assessment voluntarily paid and action to recover back held maintainable upon proof of payment without knowledge of alleged defect.

The difference, as regards the point at issue, between the present case and each of those above mentioned, is not only clearly apparent, but also fundamentally important and substantial.

Without referring in detail to the general expressions, argumentative and otherwise, contained in the respective opinions in these several cases, any whereof would purport to furnish or constitute a rule to govern the case here presented, it would seem to be sufficient to say of such expression that it clearly was and could not be otherwise than such a manifest wandering from the very point to be decided, as deprives it of the force of an official utterance, and while such an expression as may be respected, ought not to control the judgment in this subsequent case, where the very point is presented for decision.

In this connection it may also be mentioned that the cases of *Spencer* vs. *Merchant*, 100 N. Y., 585, affirmed by this court, 125 U. S., 345, and *Tonawanda* vs. *Lyon*, 181 U. S., 389, afford no support for the rule upon which the judgment herein is founded. The point involved and the ruling thereon in *Spencer* vs. *Merchant*, is fully as well as concisely stated in the opinion rendered by Mr. Justice Harlan in *Norwood* vs. *Baker*, 172 U. S., at pages 295, 296, in the language following:

"That case came here upon writ of error to the highest court of New York. It related to an assessment, by legislative enactment, upon certain isolated parcels of land, of a named aggregate amount which remained unpaid of the cost of a street improvement. In reference to the statute, the validity of which was questioned, the court said: 'By the statute of 1881 a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was ordered by the legislature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff. The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment.' Again: 'The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they are entitled.' The point raised in that case—the only point in judgment—was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case."

In *Tonawanda* vs. *Lyon* the trial Court, proceeding upon what it conceived to be the doctrine of *Norwood* vs. *Baker*, 172 U. S., 269, deemed it sufficient impeachment of the assessment in question that it was laid and apportioned in pursuance of and in conformity with a statute prescribing an erroneous rule of assessment or apportionment, even though there was no complaint that by reason of such erroneous rule complainant's assessment was more onerous than it would have been if laid and apportioned in conformity with a correct rule. As against such conception and judgment it was sufficient to say "The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances." (181 U. S., 392.)

In the case *Matter of Munn*, 165 N. Y., 149, it appeared that "the assessment was imposed upon the petitioner and another property-owner on Broadway and eight property-owners on Morris Street, and this assessment was confirmed by the board of revision on the 15th of December, 1897" (*Id.*, 152).

The Court of Appeals, O'Brien, *J.*, writing, at page 153, says:

> "In this case we must first inquire with respect to the particular law under which the petitioner has a right to review the assessment. At the time it was made the law in force was the Consolidation Act. At the time that the petition was filed in the court that act had been repealed by the new charter, which went into effect on the first of January, 1898, but the new charter preserved all rights that existed under the charter which had been repealed. By section 1614 it is provided that no right or remedy of any character shall be lost or impaired, or affected by reason of this act. This act shall not affect or impair any act done or right accruing, accrued or acquired. Any right which a party had under the old charter could be asserted, enforced or prosecuted in the same manner as when the right accrued, except as otherwise specially provided. This saving clause is comprehensive enough to enable the petitioner to review this assessment under the law existing when it was made. His right in that regard is to be found in section 903 of the Consolidation Act, as amended by chapter 613 of the Laws of 1895. * * * * * The power to set aside an assessment altogether and remit the record to the assessors has been conferred in one case only, and that is where it appears that the assessors in making the assessment have proceeded upon or adopted some erroneous principle. In such case the court has power, in the exercise of its discretion, to set aside the whole assessment although but a single property-owner complains. But whether an assessment in any case is based upon an erroneous principle or upon correct principles is a question of law. In this case, as we have seen, the entire assessment was vacated, but it is not claimed that, in making it, the assessors adopted any erroneous legal principle. The most that is claimed is that the assessment was unequal, and, therefore, unjust; but that was a question exclusively for the assessors, subject to review and correction by the board of revision. It would be manifestly impossible for the courts to entertain appeals for the purpose of adjusting questions in regard to the equality of every local assessment. When the board of revision has acted, that question is no longer open,

and so this court has held. (*In re Cruger*, 84 N. Y., 619; *In re Church Street*, 49 Barb., 455; *In re Deering*, 85 N. Y., 1; *People ex rel. Davidson* vs. *Gilon*, 126 N. Y., 147.) Had the assessors imposed the assessment uniformly in proportion to the frontage of each lot when all were not benefited in like proportion, that would have been an *erroneous principle, since all* were not equally benefited. Indeed, such a principle of assessment has been held to be unconstitutional in certain cases by the Supreme Court of the United States. (*Norwood* vs. *Baker*, 172 U. S., 269; *Conde* vs. *City of Schenectady*, 164 N. Y., 258.) A uniform assessment upon all the property-owners in proportion to the assessed value of the property might also be held to be based upon an erroneous principle. There are many other methods which the assessors might have adopted in levying the assessment that might be open to question as involving an erroneous rule, but in this case the rule adopted for the imposition of the assessment was that each property-owner was bound to pay for the expense of the sewer in proportion to the benefits received from its construction. The statute requires the assessors to proceed upon that principle and to distribute the expense of the improvement among the owners and occupants of all the houses and lots intended to be benefited thereby in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire."

It thus becomes obvious that as regards the supposed established rule of denial of remedial right against an assessment levied and based entirely upon an erroneous rule, and which a correct rule would forbid in its entirety, such denial had its legislative inception in the Greater New York charter, taking effect January 1, 1898, and its first judicial enforcement in the present case.

Thus, examination of this course of legislation and judicial decision discloses:

FIRST.—Equity jurisprudence and jurisdiction, including within its cognizance remedial right in cases of character identical with this, as administered in the English courts prior to and during existence of this colony, and, in the courts of the colony prior to and until formation of the state, and those courts and that jurisdiction recognized and continued in and by the first constitution of the state; that general jurisdiction continued in the courts by express provision of each constitution subsequently adopted; that jurisdiction of undiminished scope, including cognizance of cases of the character of this one, still exercised by the courts of the state regarding assessments elsewhere in the state than in the city of New York, and

the state constitution recognized as the source of such jurisdiction.

SECOND.—Until the decision of this case the state courts uniformly and as frequently as occasion therefor arose, announcing and adhering to the fundamental rule that a jurisdiction vested in the courts by the constitution cannot be divested or invocation or exercise thereof restricted by legislative enactment.

THIRD.—Legislation, as that of 1858, extending or affording additional and more summary statutory remedies, as matter of favor it may be conceded, cumulative to and not purporting to exclude previously existing common law or equitable remedies.

FOURTH.—Legislation by successive steps restricting remedies as aforesaid originated by and resting upon statutory provision; and by like successive steps and in increased measure restricting and finally purporting to deny to the courts jurisdiction of each and every of the common law and equitable remedies founded upon entire invalidity of the assessment, save and except only that of establishing invalidity thereof as and when a purchaser may set up claim of title under a sale made to satisfy the assessment.

FIFTH.—Judicial decision sustaining as valid these successive enactments, (1) in cases involving denial of remedies having their origin in legislative enactment; (2) in cases involving denial of common law and equitable remedies, where invocation thereof rested upon alleged invalidity of assessments by reason of non-observance of regulations or transcendence of limitations in matters of favor only, prescription whereof did not, upon the ground of either abstract right or constitutional inhibition, necessarily accompany or enter into provision for a valid assessment.

Opposite counsel have not cited in any previous brief herein, and patient research has not enabled us to find, any previous decision of the state court going the length of the present one in denying jurisdiction to grant equitable relief where the assessment appears valid upon the face of the proceedings, and the relied-upon invalidity thereof, provable only by evidence *aliunde*, is absolute and entire absence of special benefit resulting to the assessed property from the local improvement.

Obviously this case in no wise involves any interference with the established rule or policy of the state relating to local assessments, nor interference with any established rule of decision of the state courts, except as first promulgated and solely established by the judgment herein, regarding the remedial rights to which the state's power of local assessment is subject.

It seems difficult to conceive of an argument supporting the judgment of the state court in this case, based upon supposed

authority of its prior adjudications, which is not at the same time a labored apology for such disregard of constitutional guaranty as this case involves.

The contention upon which this judgment is founded seems to us to go to such length as to carry its own refutation. In its final analysis it means that such rule should be sustained because in New York City local assessments are so numerous, and invasions of private right in the laying thereof so general and inevitable, that exercise of the lawful power of assessment cannot be at all maintained unless in addition to its rightful lien for valid assessment, the city shall also be permitted to harass those unlawfully assessed by denying the right to any adjudication upon the validity of the lien until, upon the city's initiative, the property is subjected to sale, for satisfaction thereof; and the owner thereby in the meantime coerced into payment of the unjust charge, in order to hold or dispose of his property by unincumbered title, or to hold the property subject to the apparent lien until evidence of the facts showing invalidity thereof has been outlived, only to have his challenge of validity, formerly provable, finally fail him.

In other words, that legislature and judiciary have taken cognizance that in the matter of local improvements and assessments therefor these city authorities cannot perform their lawful functions unless they be permitted to therein confiscate with impunity the private property of the citizen unhampered by constitutional guaranties designed to prevent such confiscation; and, hence, that it has become and is an established state policy, to which the courts of the state are finally and effectually committed, that judicial interference with such confiscation shall not be permitted until the city make sale of the property to pay the assessment.

SIXTH POINT.

As surely as there is at all a limit upon the power and jurisdiction to impose special assessment for the cost of local improvement, entire absence of evident special benefit resulting to the assessed property from such improvement constitutes absence of such power and jurisdiction.

Upon the hearing it appeared in evidence that the property was used, and can be used, for railroad purposes alone; that the physical situation was such that there is actually no access to or from the petitioners' property and the avenue improved,

and that the present physical situation has been brought about by contract between the city and these petitioners for the very purpose of preventing access to and from public streets and the railroad property.

It also appeared, not only that petitioners' property is held and used for railroad purposes alone, but that under the charter of The New York and Harlem Railroad Company, it *can be held* for such purposes alone. The provisions of the charter of The New York and Harlem Railroad Company (above quoted) are similar to those of the charter of the Hudson River Railroad Company (the predecessor of the petitioner, The New York Central and Hudson River Railroad Company), which was considered in the case of *The New York Central and Hudson River Railroad Company* vs. *Aldridge*, 135 N. Y., 83. This case is directly in point. The action was for ejectment, the property in litigation being land under water. If the railroad company took title in fee simple absolute like any natural person, and free from any limitations contained in its charter, then its grant of land under water was good and must succeed as against the defendant. The provision of the charter of the Hudson River Railroad Company, Section 9 of Chapter 216 of the Laws of 1846, as amended by Chapter 30 of the Laws of 1848, then under consideration, is as follows:

> "Sec. 9. The said corporation is hereby empowered to purchase, receive and hold, in fee simple, such real estate and other property as may be necessary in accomplishing the objects for which this corporation is granted, and may also receive, hold and take such voluntary grants and donations of real estate and other property as shall be made to the said corporation, to aid in the construction, maintenance and accommodation of said railroad and ways, which real estate, voluntary grants and donations, shall be held and used for those purposes only."

At page 95, Mr. Justice Peckham, writing the opinion, says:

> "If the defendant's grantors by their deeds to the railroad company ceased to occupy the position of owners of the adjoining upland within the meaning of the statute, it would probably follow that the patent to the defendant was illegal. We do not, however, so regard the effect of these conveyances. The company took the lands for the use of its road and for that only. The deeds conveyed the land for that purpose only. At the time when the strip was conveyed to the company it had determined and located its line and the conveyance simply granted that which was included in such location. The company received and holds such land in fee simple by the voluntary grant of the former owners and by the provisions of the statute

it holds such real estate and can use it only for the purposes expressed in its charter—that of the maintenance, construction and accommodation of the railroad. For this purpose only the land can be used, and although the title granted to the company is a fee, yet, as thus burdened and restricted, we think the grantor in conveying the strip did not thereby cease to be the owner of the upland within the meaning of the statute."

Moreover, it has been judicially determined that property used as is the assessed property of the petitioners cannot be benefited by an improvement of the character in question.

The New York and Harlem Railroad Company vs. *The Board of Trustees of the Town of Morrisania*, 7 Hun, 652, is authority for this proposition. This was a proceeding to open a street not far distant from the land assessed in this proceeding. The assessment was levied upon the railroad company's property and was contested by the company. The Court held that the right of way of a railroad could not be assessed, because the right of way was not benefited by the street being opened.

Again, *In the Matter of the Application of the Commissioners of Public Parks*, 47 Hun, 302, which was a proceeding to open this same Vanderbilt Avenue East, in which proceeding the Commissioners imposed an assessment of one dollar upon the railroad company's right of way, to which assessment other property-owners objected, and upon the confirmation of the Commissioners' report, an appeal was taken to the General Term. Mr. Justice Van Brunt, at page 304, writing the opinon of the Court, says:

"The omission to assess for benefit the roadbed of the railroad company in no way operates as an injustice. This land could only be used for the purposes of a railway, and as such, no benefit whatever was derived from the improvement."

The "roadbed" above referred to is the same land upon which the assessments complained of have been imposed. If this roadbed, then at grade, could not be benefited by the opening of the avenue, the regulating and paving of the same avenue certainly cannot benefit the same roadbed, now depressed.

In Allegheny City vs. *Western Pennsylvania R. Co.*, 138 Pa., 382, it was held that

"while the owner of the ordinary lot of ground, whether an individual or corporation, cannot be heard to defend against a municipal assessment for paving for the reason that the law presumes such property is benefited, yet, in the case of the roadbed of a railroad, the presumption of

law is the other way. It is the same at all times and under all circumstances; hence the law declares the absence of benefits."

See also *Philadelphia* vs. *Philadelphia, etc., R. Co.*, 33 Penn., 41; *Junction R. Co. Philadelphia*, 88 *id.*, 424.

State (*Morris & E. R.R. Co.*) vs. *Jersey City*, 36 N. J. Law, 56.

Same vs. *Elizabeth City*, 37 N. J. Law, 330.

Morris & Essex R.R. Co. vs. *Jersey City*, 64 N. J. Law, 148.

It cannot be argued that because of the paving of the street greater access is secured to the station of the railroad, and that, therefore, it is a benefit conferred upon the petitioners' property; that is a benefit that accrues to the general public, and is not a special benefit for which an assessment for a local improvement can be made. See *Chicago, Milwaukee and St. Paul Railroad Company* vs. *Milwaukee*, 89 Wis., 506; 28 Lawyers' Reports, annotated, 249 and 255. The argument that the property is benefited for this reason would hold good of all streets in the locality which in any way converge toward a station on the railroad of the petitioners.

Even if the parcel west of the tracks is not used for and devoted exclusively to railroad purposes, it would not be liable to the assessment for these improvements; it does not abut upon the street being improved; there is no access from Vanderbilt Avenue East to this property, and it is not seen how this property can be benefited in any manner by the improvements. If it did not belong to the railroad company it would not be contended that it would be liable to any assessment, because other property similarly situated bore no assessment whatever. The property in block 2898, west of Park Avenue West and northerthly of 173d Street, is not within the area of assessment, and yet that property is benefited, if at all, as much and to the same extent as that part of the petitioners' property is that lies west of the roadway. This will be seen by an examination of the maps attached to the petition.

The established and uncontradicted fact, then, is that the lands of the petitioners upon which the assessments have been levied have not been, and will not be, and cannot be benefited, in any manner, or to any extent, by the improvement.

Whatever view may be entertained upon the question whether the scope of the holding of this Court in the case of *Norwood* vs. *Baker* (172 U. S., 269) was or was not as broad as dissenting opinions in subsequent cases in this Court have conceived it to be, or upon the question whether the holdings of this Court in those subsequent cases have or have not operated to limit the doctrine of that case, we deem it sufficient for the purposes of

the present case to regard this Court as having in that case found and adjudged that by reason of the erroneous rule of assessment and transcendence of the fundamental power of assessment as these affected complainant, her case "presented considerations of peculiar and extraordinary hardships amounting, in the opinion of a majority of the judges of this Court, to actual confiscation of private property to public use, and (thus) bringing the case fairly within the reach of the Fourteenth Amendment."

Tonawanda vs. *Lyon*, 181 U. S., 392.

In other words, it seems to us sufficient for the purposes of the case at bar to present it upon the hypothesis that as the Court would not entertain jurisdiction to determine the question as an abstract proposition, whether legislative enactments, or proceedings thereunder, were in contravention of the provisions of the Constitution of the United States, unless and until such proposition be made concrete by averment that such statute or proceedings thereunder had been or were threatened to be made prejudicially operative upon complainant's person or property in such wise as violated rights guaranteed to him by the Constitution of the United States, so we assume it incumbent upon one invoking relief in reliance upon a ruling of the Court, that he aver and prove not only the existence of statutory provision, or proceeding thereunder, in the abstract non-conformable to United States Constitution within the ruling relied upon, but also that his person or property have been or are threatened to be by means of such non-conformity operated upon or affected prejudicially in such wise as to constitute violation of the right guaranteed by that Constitution, upon which the relied upon ruling of the Court was founded. The hardship to which complainant in the *Norwood-Baker* case was subjected, and the obvious transcendence of the power of assessment, were evident in the facts constituting foundation of the comment of Mr. Justice Harlan couched in the words following:

> "It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special

assessments upon property in order to meet the expense of public improvements in the vicinity of such property."

The assessment in question in that case was, not one in the aggregate and entirety thereof unjust, but, palpably excessive. The legal effect of that palpable excess being the point to be decided, the opinion states:

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

This is followed by citation of and quotation from numerous judicial opinions and standard text writers amply sustaining the proposition that and the reasons why assessment in substantial excess of evident special benefit transcends the power and jurisdiction of local assessment.

Obviously the very ground upon which this Court granted relief in *Norwood* vs. *Baker* was not merely that the assessment was laid under the supposed authority of an improper rule of assessment, but that the assessment laid in pursuance of such improper rule constituted a charge against complainant's property manifestly and materially in excess of the evident special benefit resulting thereto from the improvement and thereby and to the extent of such excess constituted a taking of her property, under the guise of taxation, for public use without compensation.

And this clearly pointed out ground upon which this Court entertained jurisdiction of that case, and in the exercise of such jurisdiction granted relief therein, is reaffirmed in the case of *French* vs. *Barber Asphalt Paving Company*, 181 U. S., 324, wherein Mr. Justice Shiras, delivering the opinion of the Court, at page 345, says:

> "It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this Court, was the nature and effect of the proceedings in the case of *Norwood* vs. *Baker*."

The statute conferring the power of assessment, under the supposed authority of which the purported assessments *here* in question were laid, concedes this limitation by expressly providing for assessment and apportionment thereof according to respective benefits.

While, however, many cases upon this subject illustrate that assessment may be laid in conformity to a rule altogether

erroneous, and complainants not in any wise suffer prejudice thereby, this case very aptly evinces the proposition that prescribing by statute a perfectly righteous rule to govern the laying of assessments is such a sham as might more appropriately have been omitted when it is accompanied by a concurrent statutory provision by the terms whereof the aggrieved party is deprived of remedy, no matter how egregiously such prescribed rule may have been violated by the assessing board, nor what measure of injustice has resulted to the party affected by such violation of rule.

SEVENTH POINT.

The question whether any evident special benefit does or does not accrue from a local improvement to property assessed for the cost thereof, is one upon which the party deeming himself aggrieved is entitled to the judgment of the courts, and one that cannot be finally and absolutely determined against him by the legislature, or by the officer, board or tribunal upon whom the legislature confers the power of assessment.

This was a question necessarily considered and decided in *Norwood* vs. *Baker*, and upon which this Court, by Mr. Justice Harlan, says:

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessment to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property

abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and, therefore, should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received."

Following the above is a citation of and quotation from numerous cases not all thereof specifically deciding this question, but each thereof necessarily standing upon recognition of this right of the aggrieved party to have the judgment of the court upon the question whether in the particular case in hand, the assessing officers have in such wise transcended their power and jurisdiction that by means thereof the assessment complained of constitutes a taking of complainant's property for public use without compensation.

Transcendence of jurisdiction constituted the foundation of the judgment of this court in *Dewey* vs. *Des Moines*, 173 U. S., 193, wherein Mr. Justice Peckham, delivering the opinion, says:

"This plaintiff was at all times a non-resident of that State, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a non-resident of the State, a personal liability to pay such assessment, is a statute which the State has no power to enact, and which cannot therefore furnish any foundation for a personal claim against such non-resident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a non-resident can exist. The State may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretence proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution."

Judicial decision upon this subject clearly demonstrates the judicial view as being that it is one thing to prescribe that as regards the administration of the power of assessment within

their jurisdiction thereof, the determination and judgment of the assessing officers shall be final, and not subject to review by the courts, and it is quite another and different thing to prescribe that no matter how palpably and monstrously their prescribed jurisdiction may have been transcended, no relief shall be afforded by the courts.

The first makes the assessing officers the final arbiters upon and concerning the matters which the law has indeed committed to them; the latter renders their powers despotic by in advance pronouncing their thereafter to be conceived notions of their powers to constitute the only limit upon their usurpations of power.

The right of the court to refrain from reviewing the judgment of such officers in the exercise of their allotted exclusive functions cannot be more palpable than is its duty to take cognizance of their transcendence or abuse of their allotted and limited powers.

Examination of the existing legislation here in question, as fully set forth under the fifth point of this brief, and the opinion and judgment based thereon in this case, shows denial of remedial right in the court, the allowance whereof, in the state courts of Louisiana, constituted the very reason upon which this court held the proceedings in question to constitute due process of law, in the case of *Davidson* vs. *New Orleans*, 96 U. S. 97. In that case Mr. Justice Miller, delivering the opinion, after quoting the second sentence of section 1 of the Fourteenth Amendment, and commenting upon the extreme difficulty of perspicuously and comprehensively defining what should constitute transcendence of powers within the meaning of that provision, at pages 104, *et seq.*, says:

> "As contributing, to some extent, to this mode of determining what class of cases do not fall within its provisions, we lay down the following proposition, as applicable to the case before us:
>
> That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." * * *
>
> "This proposition covers the present case. Before the assessment could be collected, or become effectual, the

statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

The logic of this suggests at once the converse proposition that had this court found the state legislation and judicial decision thereon working absolute denial of such remedial right it would have held the proceeding as not constituting due process of law.

EIGHTH POINT.

The case here presented is not of the class wherein it is necessary to the jurisdiction of this Court that the complainants shall have directly and specifically set up and claimed a right under the Constitution of the United States.

This subject has been considered and the legal doctrine thereof stated in so many cases that it would evidently be asking a work of supererogation to invite attention of the Court to anything like a general review of the discussions and conclusions set forth in them. Thus viewing the subject matter of this point we deem it sufficient to quote briefly from two comparatively recent cases, their recital of the rule of law in relation thereto.

In *Spencer* vs. *Merchant*, 125 U. S., 345, Mr. Justice Gray, delivering the opinion, at page 532, says:

"The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the Legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the

first section of the Fourteenth Amendment to the Constitution of the United States, as well as of Art. 1, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the Supreme Court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this Court has jurisdiction to review."

In *Water Power Co.* vs. *Street Railway Co.*, 172 U. S., 475, Mr. Justice Brown, delivering the opinion, at pages 487, 488, says:

"To the argument that the Federal right was not 'specially set up and claimed' in the language of Revised Statutes, section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here:

(1) 'Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity;'

(2) 'Where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;' * * *

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."

From among the numerous instances of upholding of the jurisdiction of this court, by liberality of construction, in this respect, in no wise required by the case at bar, the following may be cited:

Jefferson Branch Bank vs. *Skelly*, 1 Black, 436.
Bridge Proprietors vs. *Hoboken*, 1 Wall., 116.
Armstrong vs. *Treas. Athens County*, 16 Pet., 281.
University vs. *People*, 99 U. S., 309.
Fisk vs. *Jefferson Police Jury*, 116 U. S., 131.

This is a case wherein the court may properly look to the opinion of the court for the grounds upon which the case was decided. The opinion is set forth in the case made for appeal in compliance with legal requirements.

"The general rules of practice established under authority of Section 17 of the Code of Civil Procedure are followed in the Court of Appeals in cases not otherwise provided for."

N. Y. Court Rules, 1900, page 9, citing,
Walkill Valley R.R. Co. vs. *Keator*, 101, N.Y., 610.

Rule 41, so established, provides, among other things, as to what shall be included in a case for appeal, that "there shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could be produced. The foregoing papers shall constitute the record in the Appellate Division."

"The rules of courts are made under special statutory authority, and when made have the force and effect of statutes."

Matter of Moore, 108 N. Y., 280.
People ex rel. vs. *Nichols*, 18 Hun, 535.

This opinion of the Appellate Division of the Supreme Court, upon which the Court of Appeals affirmed the order of the lower court, is a proper source of information to this Court as to the questions decided in the State courts. Also the certificates of the presiding Judge of the Appellate Division and of the Court of Appeals respectively, authenticating portions of the printed briefs on behalf of petitioners in those courts respectively, constitute competent authentication of the contentions of petitioners in those courts respecting the constitutionality of the law whereon the judgment of the Court was founded. Such proof is clearly within the principle of, and of more satisfactory character because less liable to possibility of mistake than, the general certificate of the Judge as to the contentions urged before him.

The cases upon these subjects are considered and the doctrine thereof announced in

Murdock vs. *City of Memphis*, 20 Wall., 590, 635.
McManus vs. *O'Sullivan*, 91 U. S., 578, 579.
Gross vs. *Mortgage Co.*, 108 U. S., 477, 485.
Philadelphia Fire Assn. vs. *New York*, 119 U. S., 110, 115.

NINTH POINT.

The judgment herein is violative of the rights guaranteed to petitioners by the Constitution of the United States, and should be reversed.

The questions to be adjudged in this case arise upon facts and circumstances which may be summarized as follows:

1. A strip of land 66 feet wide constituting a railroad right of way and a parcel of land lying westerly of that right of way, both owned by The New York and Harlem Railroad Company in fee but by the terms of its charter acquirable and usable only for railroad purposes:

2. This land and railroad held by The New York Central and Hudson River Railroad Company under lease of date April 1, 1873, having many years to run, and requiring the said lessee to pay all taxes and assessments thereon under penalty of the forfeiture of its lease:

3. A public street, Vanderbilt Avenue East, laid out and established subsequent to the building and operation of the railroad and parallel therewith, the easterly line of the railroad constituting the westerly line of the street:

4. The state courts upon the laying out of this street, in the exercise of their jurisdiction in that behalf duly invoked having adjudged that this railroad property was not benefited by and not subject to assessment for the cost of establishing and opening the street:

5. By subsequent contract between the proper city authorities and the railroad company in pursuance of law, and still in force, the surface of the railroad right of way grounds placed and maintained many feet below the level of the surface of the street and bounded by perpendicular retaining wall and fence with the intent and to the effect of rendering access impossible to and from and between said railroad grounds and said street:

6. That street improved by and under direction of the city authorities (1) by regulating and grading, setting curbstones, flagging and laying cross-walks therein; and (2) by paving thereof; the proceeding, upon the face thereof purporting to assess and apportion upon and against the lots and lands specially benefited, and according to respective benefit, the cost of these improvements, and thus assess against the said railroad lands as their proportionate share of such cost, for the first $4,687.82, and for the second $12,626.72, all upon the face of the record of said proceedings apparently regular and valid and in conformity with the statute in such case made and provided, by further provision whereof the said assessments constitute a perpetual lien until actually paid:

7. Applications to the assessing board to vacate these respective assessments upon the grounds of inequality and injustice of apportionment, and that by reason of the character, condition and necessary use of this assessed property it is not and cannot be in any respect or degree specially benefited by these improvements, and refusal of that board to receive evidence in support of such contention:

8. Petition to the State Supreme Court praying vacation of these assessments upon the grouuds set forth, and evidence, all *dehors* the record, in line with and in support of said petition, establishing (a) by undisputed documentary evidence the title of petitioners in and to the assessed property, the uses thereof to which it is restricted, and the agreement providing for rendering access impossible between said assessed property and said street; (b) by undisputed oral testimony and accompanying surveys and documents, the actual use of the assessed property, the actual condition thereof whereby in pursuance of said agreement access between the assessed property and the improved street is in fact rendered impossible, and that the assessed property is not and cannot be in any respect or degree specially benefited by the improvement for the cost of which the assessments are imposed; (c) by undisputed oral testimony that the laying and so-called apportioning of the assessment of the cost of said improvements were and each thereof was made in obedience to, and in and by the carrying out of, a previously fixed, adopted and promulgated general rule of the assessing board as to area and apportionment of assessment, and, without actual consideration of or determination upon or concerning the relative or respective benefit or measure of benefit in these particular instances resulting to the respective parcels of land within the area to which such fixed rule became in this instance applicable; and, (d) by undisputed oral testimony and concession in open court that the assessing board refused to receive petitioners' evidence of the facts, circumstances and conditions tending to prove that petitioners' said lands were not and could not be in any respect or degree specially benefited by said improvements.

9. Contention of counsel on behalf of the city that the prayer of said petition could not be granted, because the granting thereof or of any relief touching the said assessments unless and until the city makes sale of the assessed property to pay the assessments is prohibited by statute; and, that contention upon that ground sustained by the state courts, resulting in the petition being adjudged dismissed upon its merits, with costs:

10. The jurisdiction, exercise whereof was invoked by this petition, vested in and exercised by the English courts prior to and during the existence of the colony which subsequently

became the State of New York; that jurisdiction vested in and exercised by the courts of the colony by and under authority of English Statutes and Colonial Ordinances; those courts and their said jurisdiction taken cognizance of and continued by and under the first constitution adopted by the state; that jurisdiction continued in the Supreme Court, in which this petition was filed, by express provision of every constitution subsequently adopted, including the one now in force:

11. Almost with absolute uniformity and as often as occasion arose therefor the courts of the state have recognized and adjudged the source of the power and jurisdiction of the Supreme Court, as being the provision of the constitution continuing to it general jurisdiction in law and equity, and that jurisdiction not subject to control or restriction by the legislature:

12. That jurisdiction as regards relief against assessments, valid upon the face of the proceedings but in fact invalid on the ground of want of or transcendence of jurisdiction, and such invalidity thereof provable only by evidence *dehors* the assessment proceeding, always and now exercised by the courts with reference to assessments elsewhere in the state than in New York City, and the constitution recognized as and being the source of that jurisdiction:

13. Legislation regarding the granting of relief by the courts against invalid assessments (1) in 1858 materially enlarging the instance and increasing the facility of such remedy; (2) by successive steps taken from time to time from 1874 to 1897, increasingly restricting such statutory remedy, and also the common law and equity remedies based upon invalidity of assessments within the city of New York, the enactment of the latter date purporting to deny to the courts power to hold void or vacate such invalid assessment until the city shall make sale of the property to pay the assessment, upon which event the land owner is permitted to impeach the title of the purchaser by proving invalidity of the assessment:

14. These successive statutory enactments sustained by the courts in cases where the violation of rule appeared upon the face of the proceedings, and in cases involving denial of remedies having their origin in statutory provision, and in cases involving denial of remedy claim whereof was based upon non-observance of direction or transcendence of limitation, prescribed upon the exercise of the power of assessment, not, upon constitutional grounds, necessary to the validity of the assessment:

15. The judgment of the State courts in the present case, upon the supposed authority of such lines of judicial decision, going for the first time to the length of sustaining the validity

of such statutory denial of remedy as regards assessments upon the face of the proceedings valid, by evidence *dehors* the record proven invalid, in that the property of petitioners upon which these assessments are imposed not only is not and cannot be in any respect or degree specially benefited by the local improvements for the cost of which these assessments are laid, but by agreement between the city and the petitioners still in full force, the latter have at their own expense placed, and are required to perpetually maintain their railroad property in such condition as to perpetually and continually prevent access between the same and the said street:

16. By rule of the legislative enactment in this behalf as thus applied and enforced the said assessments constitute, and are to remain of record an apparently perfectly valid lien and charge against this property for and during such time as the city may refrain from subjecting the property to sale for the payment thereof during which time petitioners cannot either have any proceedings legal or equitable to test the validity of said apparent lien, nor make payment thereof, and, by reason of such invalidity of said charge and lien, recover back the sums paid on account thereof.

17. In the meantime both petitioners are deprived of their right of holding and disposing of said property free of incumbrances, and, by the terms of a lease entered into before the adoption of these enactments either preventing payment of such invalid assessment and recovery back of the sum paid on account and by reason of such invalidity thereof, or denying relief in equity by decree vacating such invalid assessment as a cloud upon title, petitioner, The New York Central and Hudson River Railroad Company, is, by reason of such denial of remedy, compelled to either pay, and thereby and altogether and finally lose the amount of said assessments, or subject itself to the hazard of forfeiture of its lease.

18. In the event of the city doing, what, in view of such invalidity of these assessments, provable only by evidence *dehors* the record thereof, it may most reasonably be expected to do in the like premises, viz.: deferring sale of said lands for the payment of said assessments until testimony to prove such invalidity thereof has been outlived, the city may then make sale of said assessed property for the amount of said assessment, with seven per centum per annum interest thereon from the date of the laying thereof, and petitioners be unable to produce evidence, now amply available, whereby to overcome the effect of the presumption of validity of said assessment which the said statute provides shall obtain in favor of and in support of the deed or lease to be executed to the purchaser at and in pursuance of the sale of said assessed property for the said assessments and interest thereon.

The statute, as construed and enforced by the State Courts, and as thus construed and enforced constituting the foundation of the judgment rendered herein, is violative of plaintiffs' property rights guaranteed by the Federal Constitution, and the said judgment should be reversed.

Respectfully submitted,

IRA A. PLACE,
Attorney for Petitioners,
Plaintiffs in Error.

THOMAS EMERY,
Of Counsel.